

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 42

**LIBRARY
SUPREME COURT U.S.**

F. W. WOOLWORTH COMPANY, PETITIONER,

vs.

CONTEMPORARY ARTS, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 24, 1952

CERTIORARI GRANTED JUNE 2, 1952

United States Court of Appeals

For the First Circuit.

OCTOBER TERM, 1950.

F. W. WOOLWORTH COMPANY,
DEFENDANT, APPELLANT,

v.

CONTEMPORARY ARTS, INC.,
PLAINTIFF, APPELLEE.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS, FROM FINAL
JUDGMENT (McCARHY, J.), ENTERED FEBRUARY 27, 1951.**

RECORD ON APPEAL.

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United States Court of Appeals

FOR THE FIRST CIRCUIT

October Term, 1950.

F. W. WOOLWORTH COMPANY,
Defendant, Appellant,

v

CONTEMPORARY ARTS, INC.,
Plaintiff, Appellee.

RECORD ON APPEAL.

No. 8771 Civil Action.

CONTEMPORARY ARTS, INC.,
Plaintiff,

v

F. W. WOOLWORTH COMPANY,
Defendant.

APPEAL OF DEFENDANT, WOOLWORTH COMPANY, FROM JUDG-
MENT (FINDING OF INFRINGEMENT, ETC.) (McCARTHY, J.)
FEBRUARY 27, 1951.

Docket Entries.

1949

- Nov 1 Complaint filed. \$15.00
 1 Summons issued.
 7 Sums. ret'd. by Marshal, served Nov 3, 1949, filed.
 17 Appearance of Clarence A Barnes and Douglas Smerdon for def't. filed.
 17 Def't's answer filed.
 17 Certificate of service of answer filed.
 19 Def't's demand for jury trial filed.
 19 Certificate of service filed.
 30 Plaintiff's motion to strike filed.

1950

- Jan 9 McCARTHY, J. Hearing on plaintiff's motion to strike def't's demand for jury trial; taken under advisement. (Any motion for transfer of venue to be referred to McCarthy, J.)
 Feb 15 Defendant's waiver of jury trial filed.
 27 Stenographic record of hearing on a motion before McCarthy, J. on January 9, 1950, filed.
 Mar 24 McCARTHY, J. Case pre-tried; assigned for trial April 25, 1 to 3 days.
 Apr 26 McCARTHY, J. Trial without jury begins; plaintiff's opening; defendant's opening; evidence; adjourned to April 27, 1950 at 10 A. M.
 27 McCARTHY, J. Trial without jury continues; evidence; adjourned to April 28, 1950 at 10 A. M.
 28 McCARTHY, J. Trial without jury continues; evidence completed, thirty days for filing briefs.
 June 21 McCARTHY, J. Arguments; parties to have one week to file findings of fact and conclusions of law; taken under advisement.

Docket Entries

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- Aug 11 McCARTHY, J. Memorandum of Decision: Judgment for the plaintiff in conformity with this Memorandum. Memo filed. Copies mailed.
- Oct 24 Plaintiff's motion for settlement of decree and award of attorney's fee filed.

1951

- Jan 22 McCARTHY, J. Hearing on plaintiff's motion for settlement of decree and award of attorney's fee; brief filed by plaintiff; reply brief to be filed by defendant in two weeks; taken under advisement.
- 22 Affidavit of Harry F R Dolan and of Cedric W Porter re attorney's fees filed.
- Feb 27 McCARTHY, J. Final judgment—plaintiff's copyright "Cocker Spaniel in Show Position" valid and infringed; plaintiff to recover of the defendant statutory damages in the amount of \$5000 as provided by the Copyright Laws of the United States; no injunction to issue upon the defendant's representation that no infringing copies of "Cocker Spaniel in Show Position" will be bought or sold by the defendant; plaintiff to recover its costs in this court taxed by the Clerk at \$, and plaintiff to recover of the defendant an attorney's fee of \$2000. Judgment filed. Copies mailed Feb 27, 1951.
- Mar 27 Notice of Appeal filed by defendant; \$5; copy sent to Dike, Calver and Porter, counsel for Plaintiff, 73 Tremont Street, Boston, Mass.
- 27 Bond for costs on appeal, Massachusetts Bonding and Insurance Company, surety, (\$250) filed by appellant.

Record on Appeal

- Apr 12 Stipulation re delivery of certain physical exhibits to the parties for use in preparing briefs, filed.
- 20 Designation of contents of record on appeal filed by appellant.
- 20 Affidavit of service upon appellee of copy of Designation, filed by appellant.
- 23 Stipulation re exhibits to be del'd to appellate court and those to be printed (approved by Magruder, Ch. J.), filed.
- 24 Motion for extension of time for docketing appeal, filed by appellant.
- 25 McCARTHY, J. Order extending time for docketing appeal to and including June 5, 1951, end of 70 day period, filed.
- May 18 Motion for extension of time for docketing appeal, filed by appellant.
- 24 McCARTHY, J. Motion for extension of time for docketing appeal allowed. (Time extended to and including June 25, 1951, end of 90 day period).

Complaint.

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(Filed November 1, 1949)

1. The action arises under the Copyright Laws of the United States.

2. The plaintiff, Contemporary Arts, Inc., is a corporation duly established under the laws of the Commonwealth of Massachusetts, having a principal place of business at 31 Stanhope Street, Boston, Massachusetts, and the defendant, F. W. Woolworth Co. is a corporation established under the laws of the State of Pennsylvania and has a principal place of business in Massachusetts at 120 Tremont Street, City of Boston, Commonwealth of Massachusetts, and in addition operates numerous retail stores throughout the District of Massachusetts.

3. In 1942, Elisabeth Philbrick of Dedham, Massachusetts, under the professional name of "Jan Allen", created and executed an original sculpture and work of art entitled "Cocker Spaniel in Show Position".

4. On or about March 26, 1942, said Elisabeth Philbrick under the professional name of "Jan Allen", complying in all respects with the Act of March 4, 1909 as amended (Title 17, U.S.C. Sec. 65) and all other Copyright Laws of the United States, secured the exclusive rights and privileges granted by the Copyright Laws of the United States in and to the copyright of her said sculpture, as a published work of art, and received from the Register of Copyrights, a certificate of registration dated and identified as follows:

"Title: Cocker-spaniel in show position. By Jan Allen, of United States. Date of publication Mar. 26, 1942 Copies received Mar. 28, 1942 Entry: Class G pub. No. 39960".

5. On or about June 15, 1943, the said Elisabeth Philbrick, under the professional name of "Jan Allen", sold, assigned and conveyed to the plaintiff, Contemporary Arts,

Inc., her entire right, title and interest in and to the copyright in said sculpture and work of art entitled "Cocker-spaniel in Show Position", whereby the plaintiff became the sole owner and proprietor in said copyright, sculpture and work of art, including the right to publish and reproduce said sculpture and work of art, and sell the same under the Copyright Laws of the United States.

6. After said March 26, 1942 the defendant F. W. Woolworth Co. has infringed the plaintiff's copyright in said sculpture and work of art, as granted and secured by the Copyright Laws of United States, by reproducing, or publishing and selling copies and reproductions of said plaintiff's sculpture and work of art entitled "Cocker-spaniel in show position", and which, on information and belief, were copied directly from plaintiff's own reproduction of said sculpture and work of art.

7. Plaintiff has notified defendant that defendant has infringed the copyright of the plaintiff under the Copyright Laws of the United States, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from its infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

Complaint

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(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies in his possession or under his control infringing said copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

Contemporary Arts, Inc.

S/ Cedric W. Porter

By DIKE, CALVER & PORTER

Attorneys for Plaintiffs

73 Tremont Street
Boston, Massachusetts

Harry F. R. Dolan
85 Devonshire Street
Boston, Massachusetts
Of Counsel for Plaintiff

November 1, 1949.

Answer of F. W. Woolworth Company.

(Filed November 17, 1949)

1. The defendant admits the allegations contained in paragraph 1.
2. The defendant admits the allegations contained in paragraph 2.
3. The defendant is ignorant as to the truth of the allegations in paragraph 3, and shall call upon the plaintiff to prove the same.
4. The defendant is ignorant as to the truth of the allegations contained in paragraph 4, and shall call upon the plaintiff to prove the same.
5. The defendant is ignorant as to the truth of the allegations contained in paragraph 5, and shall call upon the plaintiff to prove the same.
6. The defendant denies the allegations contained in paragraph 6, and shall call upon the plaintiff to prove the same.
7. The defendant denies the allegations contained in paragraph 7, and shall call upon the plaintiff to prove the same.

F. W. WOOLWORTH COMPANY

By its Attorneys,

S/ CLARENCE A. BARNES

S/ DOUGLAS SMERDON

**Hearing on Motion to Strike Defendant's
Demand for Jury Trial.**

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On January 9, 1950, this matter came on before the court (McCarthy, J.), upon motion of plaintiff (filed November 30, 1949), to strike defendant's demand for jury trial, (filed November 19, 1949), and after hearing, was taken under advisement.

Stenographer's Record of Hearing.

Court Room No. 6,
Federal Building,
Boston, Massachusetts,
January 9, 1950

The Court. This is a motion on one count?

Mr. Porter. Yes, sir. It is a standard copyright suit, copied from a form suggested by the Rules of Civil Procedure which asks for an injunction, an accounting and an impounding so that it appeared to me it was clearly an equitable type of case and then the defendant asked for a jury trial but it seemed to me it was not that type of case at all and that it was the purpose of this motion.

The Court. The defendant demands a jury trial?

Mr. Porter. Yes, sir. It is a strange situation.

The Court. You appear—?

Mr. Porter. I am the plaintiff, sir. Two cases seem to be pretty clear in this Court. It depends upon the type of relief requested, whether it is non-jury or a jury case.

The Court. Why do you think you are entitled to a jury case?

Mr. Smerdon. We had a similar suit in 1947 by the Contemporary Arts. The manufacturer, Miller, came in and intervened and it was disposed of, I understand, for \$2,000.

This case here is based upon a supposed infringement of a copyright which is a little bit different. The other one was a Doberman Pinscher and this one is based on

a Cocker Spaniel which looks like that (handing picture to the Court).

What they are seeking primarily, your Honor, is damages. They are looking for statutory damages. There is no evidence they have that this item was sold throughout the country. They haven't one sales slip, I believe—

The Court. They are seeking injunctive relief.

Mr. Smerdon. There is no problem with the Woolworth Company. They handle thousands and thousands of items which are cleared through the executive offices in New York. They have hundreds of stores throughout the country and this case hasn't been pretried yet.

It is a statutory liability case. It is a serious fact whether Woolworth has sold this merchandise. It has never been sold in the New England territory. Number three, the quantity has yet to be determined.

I don't know myself because I haven't heard from the executive offices, and there is a serious question of fact on the damage question because they say they have been irreparably damaged even if a small quantity has been sold because it is competing with their product here.

There are very serious questions of fact which we would like to have the right to have the jury pass upon under Rule 38. I haven't submitted a brief and I believe this case would be within your Honor's discretion to grant us a jury trial.

The Court. If you want to submit a memorandum to me, you can. I will take it under advisement.

Mr. Smerdon. I have perfect confidence in your Honor's decision.

The Court. I suggest a memorandum because as the matter lies in my mind, I think there is some authority for the proposition in this district or one of the other districts that you would not be entitled to a jury trial. I think there is. I thought you might want some chance to get some authority because I think the law is against you. That is why I want to look into it.

These are all joined. Under ordinary circumstances you would be entitled to a trial. You can have a trial in infringements of copyrights, but in a situation where injunctive relief is sought, it is all joined in one, whole picture.

Mr. Smerdon. This injunctive relief, your Honor, we do not take too seriously for this reason.

The Court. The Court has to take it seriously as part of the pleadings.

Mr. Smerdon. The defendant is so substantial, the first sign of any infringement case, they will immediately withdraw, as a matter of practice, everything on the market which they are selling on that item until the controversy is settled by a court of competent jurisdiction.

The Court. They are a very responsible concern and I say this without casting reflection, but why wouldn't you be better off with a judge than you would with a jury? Why wouldn't a judge be better to decide these complicated cases?

Mr. Smerdon. That might be true but I have to consider the counsel for the executive offices in New York. There is a question it may be transferred to another jurisdiction because of witnesses, all witnesses are in New York and Pennsylvania. There isn't a witness up here except Mr. Porter's client.

The Court. If it comes before me, you will try it right here; frankly I will tell you that right now. Corporations like Woolworth Company complain over spending some money for witnesses coming from Boston when they have a fellow gallivanting all over the world, treating women as mere chattels; leading a rotter's life? Don't be silly. Here is a fellow who lives in Boston. You think he should go to New York because the Woolworth Company is in New York? You will reserve this case for me, Mr. Clerk; I will pass upon all motions. I won't do it.

Mr. Smerdon. That makes me very happy because we will have the legal business in Boston.

The Court. Don't you feel that way about it?

Mr. Porter. Yes, I do, very strongly, sir.

Mr. Smerdon. The manufacturer, your Honor, will be primarily liable here and not the Woolworth Company, if there is any liability at all. I would appreciate it if we could hold your decision in abeyance until we have had a chance to see whether the manufacturer is going to intervene and they may have other counsel.

The Court. I would like to have you feel—if you feel you are entitled to have a jury trial, I will give you time to file a memorandum with me. I have a feeling the other way. You want until Friday to file a memorandum?

Mr. Smerdon. I don't think that would be quite enough time, your Honor.

The Court. How much time do you want?

Mr. Smerdon. Ten days.

The Court. All right, that's fine. You might file one, too.

Mr. Porter. I have filed one, sir. I handed it to Mr. Duwan.

The Court. All right, you have 10 days. You should file a memorandum, but I think the case should be tried here. Why should the Woolworth Company feel it should be tried in New York because they have to spend some money to bring witnesses; his client can stay right here. He brought suit here and I think he is entitled to have his rights determined here.

Waiver of Claim for Jury Trial by Defendant. 13

(MEMORANDUM: On February 15, 1950, defendant filed waiver of claim for jury trial. JOHN A. CANAVAN, Clerk.)

Trial.

On April 26, 1950, trial began before the Court (McCarthy, J.), without jury, upon the merits. Trial continued through that day and on April 27th and April 28th. On April 28, 1950, after the evidence was completed, the parties were given thirty days in which to file briefs. Thereafter on June 21, 1950, the date set for final hearing before the court, after oral arguments by counsel, the matter was taken under advisement.

Final Judgment.

(February 27, 1951.)

This action came on to be heard at the Final Hearing, after submission of proofs, oral arguments and briefs by counsel for the respective parties and upon consideration thereof, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's copyright in its sculpture and work of art entitled "Cocker Spaniel in Show Position" by Elizabeth Philbrick using the professional name of Jan Allen, embodied in Certificate of Copyright Registration, Class G, Pub. No. 39,960 and bearing the publication date of March 26, 1942, is a good and valid copyright and is owned by the plaintiff.
2. That the plaintiff's copyright in its sculpture and work of art "Cocker Spaniel in Show Position" has been infringed by the defendant F. W. Woolworth Company's sale of unauthorized reproductions of plaintiff's said sculpture and work of art.
3. That the plaintiff recover of the defendant statutory damages in the amount of Five Thousand Dollars (\$5,000.) as provided by the Copyright Laws of the United States.
4. On defendant's representation that no more infringing copies of plaintiff's copyrighted sculpture and work of art entitled "Cocker Spaniel in Show Position" will be bought or sold by the defendant in its retail stores throughout the United States, its territories and possessions, no injunction is issued against further infringing acts.
5. That plaintiff recover its costs in this court, to be taxed by the clerk.
6. That the plaintiff recover of the defendant an attorney's fee of two thousand dollars (\$2,000.)

s/ WILLIAM T. McCARTHY

United States District Judge 2/27/51

Memorandum of Decision.

15

(August 11, 1950.)

McCarthy, D. J.:

This is an action for infringement of copyright under the Copyright Laws of the United States (Title 17, U.S.C.A. Section 1 *et seq.*) brought by Contemporary Arts, Inc., a Massachusetts corporation, having a principal place of business at 31 Stanhope Street, Boston, Massachusetts, against the defendant F. W. Woolworth Company, a corporation of Pennsylvania, having numerous retail stores throughout the United States and in the District of Massachusetts.

The copyrighted work is an original sculpture and work of art entitled "Cocker Spaniel in Show Position", designed in 1942 by Elizabeth Philbrick (now Mrs. Glenn G. Hall) of Dedham, Massachusetts, under the professional name of "Jan Allan", and on which Registration of Copyright was duly granted by the Register of Copyrights Class G. Pub. No. 39960, with a publication date of March 26, 1942 (Plf's Exh. 3).

Miss Philbrick duly assigned her copyright to the plaintiff by an assignment dated June 15, 1943 (Plf's Exh. 4).

Sculptured models embodying the plaintiff's copyrighted work, which the plaintiff sells commercially, are a red plaster model which sells at retail for \$4.00 (Plf's Exh. 5), a red porcelain model selling at retail for \$9.00 (Plf's Exh. 6) and a black and white porcelain model selling for \$15.00 (Plf's Exh. 7).

The infringement charged is the sale of ceramic models of a cocker spaniel in show position by the defendant F. W. Woolworth Company in its retail stores. One of such ceramic models was bought at the Woolworth Store in New York City at Fifth Avenue and 39th Street by Fred Press, the plaintiff company's chief designer and production man, on May 5, 1949 for \$1.19. The model itself is Plaintiff's Exhibit 1 and the sales slip showing

the purchase is Plaintiff's Exhibit 2. A second such Woolworth model is marked Defendant's Exhibit A.

It appeared at the trial that the defendant F. W. Woolworth Company bought 127 dozen of the alleged infringing ceramic models from the Sabin Manufacturing Company of McKeesport, Pennsylvania, which were delivered to the Woolworth Company in March, April and May, 1949. The Sabin Manufacturing Company, jobber and dealer in such articles, is a partnership (one of the partners being Sam Sabin).

The alleged infringing models were manufactured by the Lepere Pottery Company of Zanesville, Ohio, which sold them to the Sabin Manufacturing Company. The Lepere Pottery Company is apparently a partnership owned and operated by Otto and Paul Herold.

It is the plaintiff's contention that the ceramic models sold by the Woolworth Company (Plf's Exh. 1 and Deft's Exh. A) were directly copied from one of the plaintiff's plaster models, such as Plaintiff's Exhibit 5, which the plaintiff has been selling on the open market through dealers, pet shops, gift shops and the like continuously since 1942.

All of the plaintiff's copyrighted models bear a copyright notice, the plaster models such as plaintiff's Exhibit 5 having a "C" in a circle impressed on the left hind foot and the name "Jan Allan", and the porcelain models (plaintiff's Exhibits 6 and 7) carrying the copyright notice on a small printed label attached to the model.

The business of the plaintiff Contemporary Arts, Inc. is the designing, manufacture and sale of small sculptured figurines and statuettes, principally dancing and national figures and objects, and dogs and other animals. The plaintiff designs, manufactures and sells some 250 different pieces of sculpture currently, all of which are originals designed by the plaintiff's own sculptors, and 100 of them are dog models. All of the plaintiff's designs are original and exclusive with plaintiff and all are copyrighted.

Its principal designers are Elizabeth Philbrick, whose professional name is "Jan Allan", Elizabeth Dyer and Fred Press. Miss Philbrick has designed most of their dog models, as well as the "Cocker Spaniel in Show Position", and the plaintiff's catalog (plaintiff's Exhibit 10) states "The Jan Allan dog collection is the most complete in this country". The "Cocker Spaniel in Show Position" as sculptured by Jan Allan is original and the copyright in it is valid. The sculpture of an animal is copyrightable subject matter under the copyright laws. 17 U.S.C.A. S 5. It is not the subject, but the treatment thereof that is protected by the statute. *Stephens v. Howells Sales Co.*, DC, 16 F. 2d 805.

In designing dog sculptures the plaintiff makes every effort to make the dog model authentic, realistic and true to type. Prize-winning dogs, their anatomy, physical structure and features are carefully studied, dog experts and judges are consulted for criticism of the first, soft clay model, and again on the completion of the final commercial models in both plaster and porcelain. Great care is similarly taken in the manufacturing process to have the models accurate, authentic and of the highest quality. The reason for this research and careful workmanship is that the bulk of the plaintiff's sales of its dog models is made to dog owners and dog fanciers, who demand authentic types.

The research, original design and careful workmanship of the plaintiff in creating and producing its sculptures necessarily requires that plaintiff's statuettes be sold at higher prices than similar statuettes in both plaster or porcelain made by competitors can command.

The plaintiff makes and sells its designs in both plaster and porcelain. Some understanding of the steps involved in the manufacture of both plaster and porcelain models is necessary for appraising the defendant's defense of non-infringement or non-copying of the plaintiff's copyrighted dog. In making plaster models, after the pre-

liminary research as to the physical structure and features of prize-winning dogs, a soft clay or plasterlene model is first designed which, when it has received the approval of the dog experts, is then transferred into durable plaster. For this purpose a mold is first made from the soft clay model and in so doing the soft clay model is necessarily destroyed. The cavity in the mold is then filled with plaster and this plaster model becomes the master copy. In making this hard plaster model and master copy, the mold is chipped away and destroyed. The hard master mold is then used for making flexible rubber molds, used in commercial manufacture of the plaster models. After a plaster model is pulled out of its rubber mold, it is cleaned; the mold seams are smoothed off; the model is dried in a hot room, colored, and the dog's features carefully painted on by hand. The model is then glazed, i. e. coated with a fine powdered glass which is then baked at a high temperature which fuses the glass onto the model.

In producing a model in ceramic or porcelain, changes and additional steps in the manufacturing process are required. Ceramic is a generic term for describing articles made of clay, which are then fired or baked (such as earthenware, pottery and porcelain). The quality and temperature of the firing depends on the grade or kind of clay used. Starting with the same plaster master-copy used in making the plaster models, the plaster master-copy must be altered to fit the demands of ceramic. In ceramics a hard plaster mold which will not pull away or around an undercut is employed. Thus, the plaster master-copy has to be altered to make it possible to pull away the various sections of the hard-mold. For this purpose all undercuttings are filled in or eliminated. The hard plaster model is then made (in sections) over the plaster master-model and the model is removed. From then on it is merely a question of pouring the ceramic clay into the hard plaster mold. The ceramic clay (which

is different from the plaster used in making the plaster model) is caused to settle in the mold and a large part of the moisture in the clay is absorbed into the plaster. The sections of the mold are then removed; the model is covered with a filler of glaze (powdered glass) and placed in a kiln to bake at a very high temperature. The plaintiff's porcelain models are baked at 2300° F. Hand decoration is applied around the eyes, nose and muzzle of the dog in the form of fine particles of ground glass and the model is then fired a second time to fuse the decoration into the first glaze. Before firing, the ceramic clay dog is the same size as its plaster master model, but in the baking process the clay shrinks and the finished ceramic model is perceptibly smaller than its plaster model, the degree of shrinkage depending on the fineness of the clay used and the temperature used in firing the clay. In ceramics it is impossible to obtain the same detail as in plaster, because the glazing cannot be accurately controlled and while in molten condition will frequently run in an unpredictable manner. A large number of second, third and fourth quality pieces are obtained in making ceramic and particularly porcelain models.

I find from comparing plaintiff's plaster model (plaintiff's Exhibit 5) with the Woolworth ceramic model (plaintiff's Exhibit 1 and defendant's Exhibit A) that the Lepere Pottery Company has directly copied the plaintiff's plaster model (plaintiff's Exhibit 5) by using one of them as its own master model from which it made its own molds used in making its ceramic models sold by the Woolworth Company (plaintiff's Exhibit 1 and defendant's Exhibit A). The hair conformations and arrangements which appear on the plaintiff's copyrighted plaster model (plaintiff's Exhibit 5) appear in substantial identity on the Woolworth ceramic models (plaintiff's Exhibit 1 and defendant's Exhibit A); these are features which no two sculptors doing original and independent work could probably make identical through coincidence.

There are some differences between the plaintiff's plaster model (plaintiff's Exhibit 5) and the Woolworth ceramic model (plaintiff's Exhibit 1 and defendant's Exhibit A). But, of course, it is not necessary that a copy be a "Chinese copy" in order to find infringement. *Pellegrini v. Allegrini*, DC, 2 F. 2d 610; *Fleischer Studios v. Ralph A. Freundlich, Inc.*, DC, 5 F. Supp. 808, 18 C.J.S., Copyright and Literary Property, 215, S. 94. The most striking difference is that, where the plaintiff's plaster model is substantially smooth-surfaced, particularly on the neck and back, the Lepere Pottery Company has scratched or cut irregular grooves into the surface of its model to indicate hairlines. If these grooves or incisions were filled in the respective dog models would be identical in appearance. The Woolworth ceramic dog is likewise smaller in size than plaintiff's plaster model (plaintiff's Exhibit 5), but this is due to its being cast in ceramic clay, which shrinks during firing. The plaintiff's porcelain models (plaintiff's Exhibits 6 and 7) are likewise even smaller than the Woolworth ceramic model (plaintiff's Exhibit 1 and defendant's Exhibit A), due to the finer quality of porcelain and the higher firing temperature used. Other slight differences appear where the undercuttings have been filled in, particularly at the neck, and the vertical line of the legs and fit have been straightened, again to eliminate undercuttings. But these changes to eliminate undercuttings are required to be done to prepare a plaster model for casting in ceramic clay, as pointed out above in which a hard mold is used, and the mold cannot be stretched or pulled around the undercuttings, as is possible with the flexible rubber molds used in making plaster models.

Since the Lepere Pottery Company has directly copied one of plaintiff's plaster models such as plaintiff's Exhibit 5, by using it as its own model, the changes caused by adding the hairline markings and filling in undercuttings to prepare its model for ceramic casting do not avoid

infringement of plaintiff's copyright. It is still an infringement if it appears that the copyrighted work has been copied, although altered or paraphrased.

A comparison of plaintiff's plaster model (plaintiff's exhibit 5) with the grey plaster model (defendant's Exhibit 7) produced by defendant's witness Harry Moyer is informative. This grey plaster model has the hairlines cut into it and the undercuttings have been filled in and eliminated, as in defendant's ceramic models (plaintiff's Exhibit 1 and defendant's Exhibit A) to permit casting in ceramic. But otherwise the grey plaster model is identical in measurement, in the three dimensions of length, width, and height, of head, body, legs and tail and in the hair conformations and arrangements, with plaintiff's plaster model (plaintiff's Exhibit 5). This was demonstrated by the sculptress Miss Philbrick when she applied a pair of calipers to the two models respectively, making repeated measurements and comparisons at a great number of points. Such identity in measurement, shape and hair conformation to the minutest detail hardly could be the result of coincidence and precludes the contention that the Lepere Pottery Company did original and independent work. The similarities being so striking, access may be inferred. *Arnstein v. Porter*, 2 Cir., 154 F. 2d 464.

The court in a copyright case must determine whether or not the fact of infringement is proven, and the opinion of experts, although helpful, may not be substituted for the court's judgment. *Encyclopedia Britannica Co. v. American Newspaper Associates*, CCNJ., 130 F. 460; *West Publishing Co. v. Edward Thompson Co.*, CCNY., 169 F. 833; *Allegrini v. DeAngelis*, D. C., 59 F. Supp. 248. "The existence of infringement is dependent upon the question whether the ordinary, reasonable person would fail to differentiate between the two works or would consider them dissimilar by reasonable observation. *Hein v. Harris*, CCNY., 177 F. 875." *Allegrini v. De Angelis*, *supra*,

at 251. The test is that of "the library rather than that of the dissecting room." (*Eisman v. Samuel Goldwin, Inc.*, D. C., 23 F. Supp. 519, 520); for that reason I am convinced that, while the defendant's expert dog-breeder and fancier may be able to distinguish between the dogs for technical reasons, the average reasonable observer would not. The question of artistic merit or value has no bearing upon the rights of the parties. *Pellegrini v. Allegrini, supra*.

The only defense to this evidence of direct copying of plaintiff's copyrighted plaster model by Lepere Pottery Company is the testimony of one Harry Moyer, employed by the Lepere Pottery Company, who stated that he himself created the identical design embodied in Miss Philbrick's copyrighted design in suit, in 1938, four years earlier than Miss Philbrick. He testified that the grey plaster model (defendant's Exhibit F) was "exact like" his own prior design; that the grey plaster model (defendant's Exhibit F) which is marked on the bottom "A.M.Co. 1938" is "an exact dog of the one which I made for Burley Pottery in 1938" from an English cocker spaniel which had been given to him; that he had found the grey plaster model in a cabinet at the Lepere Pottery Company in the early part of 1950; that it was in the cabinet of the Lepere Pottery Company when he went there in 1945; that his own cocker spaniel model, of which the grey plaster model (defendant's Exhibit F) is an exact likeness, was made and sold commercially by the Burley Pottery Company in 1938, when he was working for Burley, and again by Lepere Pottery since 1945; that he had never asked nor was paid anything for this design, either by the Burley Pottery or Lepere Pottery. Moyer further admitted that he had no sculpturing experience, was not a dog expert, knew nothing about cocker spaniels, that his own dog was an English Cocker spaniel, which was "very heavy coated", and which was never trimmed for showing purposes. But, as Miss Philbrick testified,

her own copyrighted cocker spaniel was a composite or "ideal cocker spaniel", in which she sought to embody all the good points and features desired by cocker spaniel judges and experts in the American Cocker Spaniel in 1942. Her own cocker spaniel model is shown in show position and has been trimmed for showing. I find it difficult to believe that Moyer could have created by his own original independent work, and as a pure coincidence, an English cocker spaniel model, identical in its minutest details of hair configurations and dimensions (except for the added hairline carvings and filling in of undercuttings mentioned above with plaintiff's copyrighted model of the "Ideal American Cocker Spaniel of 1942", which had been trimmed for showing.

Moyer was entirely at a loss to account for or to explain the notation "A.M.Co. 1938" which appears on the grey plaster model (defendant's Exhibit F), and that fact is wholly without probative significance to indicate that the grey plaster model (defendant's Exhibit F) was made in 1938. It could readily be scratched on the model at any time by anyone desiring to do so. Mr. Press showed how this could be done by scratching similar markings on his own plaster model (plaintiff's Exhibit 11) in the presence of the Court during trial.

The Moyer testimony further conflicts with the previous statements as to the origin of the infringing Woolworth model (plaintiff's Exhibit 1 and defendant's Exhibit A), which appear in the letter of Sabin Manufacturing Company to the Woolworth Company dated October 31, 1949 (plaintiff's Exhibit 15) which stated:

"In regard to your recent letter, I am sorry this was not answered sooner, but I have checked quite thoroughly into the matter. We have purchased these molds from a pottery who has been making this dog since 1936.

Please be advised that he states this was copied from a glass dog made in England. However,

he is trying to find the original of this dog and up to the present writing, we have been unable to secure this sample. However, we would like to know when this copyright was put into effect."

No evidence was produced supporting the statements made in this letter. This earlier statement conflicts with Moyer's testimony produced at the trial.

The account given by this witness was uncorroborated. Viewing it as a whole, I am unable to give credence to his testimony.

I find that the plaintiff's copyright has been infringed by the defendant's sale of ceramic models copied from the plaintiff's sculpture.

The plaintiff offered testimony that the sale of its plaster and porcelain models of its "Cocker Spaniel in Show Position", embodying the copyright in suit, and selling at \$4.00, \$9.00 and \$15.00 respectively, was harmed by the sale of the "Woolworth dog" in the defendant's stores for \$1.19. The plaintiff has had to design a new model of a cocker spaniel in show position, which has been done by Mr. Press, and which model is plaintiff's Exhibit 12, to replace Miss Philbrick's model. It is natural for dealers to think that the plaintiff is making and selling a cheaper reproduction of inferior quality through the Woolworth Company at a much lower price, and to refuse to do business with the plaintiff. It is difficult, if not impossible, for the plaintiff to prove its actual damages and defendant's profits, with the certainty required by the law for recovery of actual damages and profits.

The evidence shows that the defendant has bought 127 dozen or a total of 1524 of the infringing cocker spaniel ceramic models from the Lepere Pottery Company. The Copyright Act, Title 17, U.S.C.A. S 101, permits the Court "in lieu of actual damages and profits" to award "such damages as to the Court shall appear to be just, and in assessing such damages the Court may in its dis-

cretion" allow a sum not exceeding \$5,000, nor less than \$250, which shall not be regarded as a penalty, at the rate of \$10 in the case of a painting, statue, sculpture, for every infringing copy made or sold by or found in the possession of the infringer, his agents or employees. The number of 1524 copies of the infringing cocker spaniel shown to have been sold by the Lepere Pottery Company to the defendant Woolworth Company is obviously more than the number required to justify the Court in awarding the maximum statutory damages of \$5,000, at the rate of \$10 per infringing copy.

Pursuant to S 101 of the Copyright Act, and "in lieu of actual damages and profits" the Court in its discretion awards the plaintiff statutory damages in the amount of \$5,000, at the rate of \$10 per infringing copy for the first 500 infringing copies.

In the light of the testimony at the trial I do not find it necessary to issue an injunction restraining the defendant from any further sales of this sculptured object.

Judgment may be entered for the plaintiff in conformity with this memorandum.

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Stenographic Record of Trial.

Court Room No. 5, Federal Building
Boston, Massachusetts
Wednesday, April 26, 1950

Mr. Barnes. If your Honor please, there are some things which might shorten the trial.

The Court. I had in mind there were possibly some details that might save time. I don't suppose you dispute the fact that this was registered in 1942, or copyrighted.

Mr. Barnes. I admit the copyright of 1942.

Mr. Porter. And the assignment to the plaintiff of the copyright.

The Court. By whom was it registered?

Mr. Porter. It was registered in the name of Jan Allen, which is the pen name of the sculptress.

The Court. That was in 1942?

Mr. Porter. Yes, sir, and then the copyright registration was assigned to Contemporary Art.

The Court. In 1942. That will be admitted?

Mr. Barnes. Those papers may be admitted as exhibits in the case.

The Court. Now, have you any other suggestions, Mr. Barnes?

Mr. Barnes. Well, I have ascertained from the Woolworth Company the number of dogs that they bought which it is alleged are an infringement of this 1942 copyright, and on which the defense is that they were not an infringement. And the number of those dogs that the Woolworth Company bought from Sabin Manufacturing Company of McKeesport, Pennsylvania, amounted to 127 dozen. And those dogs were bought in March, April and May of 1949, and they were distributed to 34 retail stores of the Woolworth Company in different parts of the country. The purchase price of the dogs from Sabin Manufacturing Company was 60 cents a dog, and they sold at retail for \$1.19 a piece. That is admitted.

Mr. Porter. And I take it, there is no dispute about the particular Woolworth dog that we are offering. Mr. Press happened to buy it at a Woolworth store.

The Court. That is the dog that is described as the Woolworth dog, and there were how many dozen?

Mr. Barnes. 127 dozen.

The Court. 127 dozen purchased from the Sabin Manufacturing Company of Pennsylvania. And they were distributed to how many stores?

Mr. Barnes. 34 stores.

The Court. And they were disposed of at a price of \$1.19, and the Woolworth Company paid 60 cents.

Mr. Barnes. Now, on the question of the identity of the dog, we have here the dog which the Sabin Company sold to the Woolworth Company. If that corresponds to the exhibit which Mr. Porter produced, then that, we can agree, is the dog.

The Court. Have you got the dog that you sold to the retail public?

Mr. Barnes. Yes, your Honor.

The Court. And I understand counsel is going to agree without any evidence that that is the Woolworth dog?

Mr. Porter. We have one Woolworth dog, sir, that Mr. Press bought on May 9, 1949 at the Fifth Avenue store at 39th Street, New York City, of the Woolworth Company.

Mr. Barnes. I want to get from my client the dog that we actually sold and compare it with this dog.

The Court. Is this the dog that you actually sold?

Mr. Barnes. That is what I want to find out. [Consulting associate]

The Court. Now, can we reach some agreement?

Mr. Barnes. Mr. Porter has a dog which he bought at a Woolworth store on Fifth Avenue, New York, and that apparently corresponds to the dog that was sold to the Woolworth Company by the Sabin Manufacturing Company, and I would like to mark his dog and one of our dogs, which apparently are similar in all respects, but we

can have them marked so that his can be identified, and mine can also.

The Court. Well, can we agree upon this, for the purpose of saving time, that the dog marked Exhibit 1 was purchased by Fred Press of the plaintiff company at the Fifth Avenue store at 39th Street of the Woolworth Company, on May 5, 1949, for which he paid \$1.19, with a tax of three cents? Has Mr. Barnes seen that?

Mr. Barnes. Yes, sir.

The Court. Then suppose we have that marked. Mark the dog Plaintiff's Exhibit 1, and the sales slip Plaintiff's Exhibit 2, both exhibits of a sale not disputed by the defendant company, and the price paid was \$1.19. Doesn't that take care of it?

Mr. Porter. Yes, sir.

[Sample of cocker spaniel statuette purchased at Woolworth store at Fifth Avenue and 39th Street, New York City marked Plaintiff's Exhibit No. 1.]

[Sales slip covering above purchase marked Plaintiff's Exhibit No. 2.]

The Court. Now, are you going to offer the assignment?

Mr. Porter. I was going to offer the copyright and the assignment to the plaintiff company.

The Court. You don't object to that, Mr. Barnes?

Mr. Barnes. No, sir.

Mr. Porter. We will put them in right now.

The Court. Very well, the copyright may be marked, and it is admitted with the consent of the defendant company.

[Copyright covering plaintiff's cocker spaniel statuette marked Plaintiff's Exhibit 3.]

Mr. Porter. And the assignment of the copyright is to Contemporary Arts Inc., dated June 15, 1943.

[Assignment of copyright marked Plaintiff's Exhibit No. 4.]

The Court. Is there anything else you can offer?

Mr. Porter. Not in the formalities, no, your Honor.

Mr. Barnes. I don't think Mr. Porter has any objection to having this marked as a defendant's exhibit (indicating).

Mr. Porter. I don't object.

The Court. Defendant's Exhibit A is admitted with the consent of the plaintiff corporation.

[Sample of cocker spaniel statuette sold by the Sabin Manufacturing Company to Woolworth Company marked Defendant's Exhibit A.]

Mr. Barnes. And it is agreed that that dog is the dog sold by Sabin Manufacturing Company to the Woolworth Company in the amount of 127 dozen.

The Court. And that a dog exactly similar in kind, type and style to that one is the kind of a dog that was purchased by the Woolworth Company from the Sabin Manufacturing Company in March, April and May of 1949.

Mr. Barnes. Now, the only other thing that it might be well to have before the Court is the position of the Woolworth Company in this matter.

The Court. What I thought I would do is this, and for the specific purpose of giving a clear position of both sides, that I would hear an opening.

Mr. Barnes. For the record—I don't think my brother knows about it anyway—the Sabin Manufacturing Company is the real defendant in this case, and the Woolworth Company is indemnified. What was the interpleading we had here?

Mr. Smerdon. There was an indemnification agreement whereby Sabin Manufacturing Company indemnified Woolworth for all damages. The Woolworth Company are here simply to watch the proceedings, and there would be a precedent formed when this decision comes down from your Honor, and they only have a passive interest in the case, and the financial interest is in Sam Sabin, who is a small manufacturer in McKeesport, Pennsylvania.

Mr. Porter. That means that the Sabin Company is openly defending?

The Court. I don't think I need concern myself with that.

Mr. Porter. I don't think so. That is an agreement between themselves.

Mr. Barnes. We appreciate that if there is any liability, the Woolworth Company is primarily liable, and they have the secondary agreement of indemnification from Sabin.

Mr. Porter. Then it is agreed that the Sabin Manufacturing Company is openly assisting in the defense of the case.

Mr. Smerdon. Oh, yes.

The Court: I don't suppose that will be helpful to me. It isn't one of the issues before me. The issue is whether or not there is an infringement of the copyright, isn't it?

Mr. Porter. That is right.

Mr. Barnes. I thought it might have some bearing upon the testimony of the witnesses, and I wanted the Court to know it.

The Court. Yes. As a matter of fact, I think, by the association of ideas, I can remember now that there was a discussion of that when we had a pretrial of the case, and what you have is a binding contract which protects your client in case of loss.

Mr. Smerdon. To save time, we might be able to agree on the dogs that they have. We put in our dogs here, and I assume they have models they are going to introduce and have them marked as exhibits, and it might save the Court some time.

The Court. That is all right. After all these agreements, what more will you need? You are pretty near finished, aren't you?

Mr. Barnes. If your Honor is going to allow an opening by both sides, I think we can explain our position.

The Court. That is right. Let us have an opening, and see how far we are apart. Now, I would suggest that if you are in agreement that you go right ahead and have them marked now.

Mr. Porter. I will offer the three models of the plaintiff's dogs embodying the copyright in suit, the first one being a plaster model.

[Plaster model of plaintiff's cocker spaniel marked Plaintiff's Exhibit No. 5.]

Mr. Porter. And then a red porcelain model.

[Red porcelain model of plaintiff's cocker spaniel marked Plaintiff's Exhibit No. 6.]

Mr. Porter. And a black and white porcelain model.

[Black and white porcelain model of plaintiff's cocker spaniel marked Plaintiff's Exhibit No. 7.]

Mr. Barnes. May I ask, in your copyright is there a picture of the dog? I saw it somewhere.

Mr. Porter. Not in the copyright.

Mr. Barnes. Not attached to the copyright?

Mr. Porter. But in the copyright office, you supply models, but they are down in Washington, of course. Now, I have a couple of photographs, for no particular reason. They are ones I supplied at their request previously when they wanted photographs of their own dog, and it may be that that will be of help in the case. They are photographs, side, back and front view, of the dog model, the Woolworth model.

Mr. Smerdon. Your Honor has the originals, but we have no objection to the photographs.

The Court. All right.

[Photographs of Woolworth cocker spaniel model marked Plaintiff's Exhibits 8 and 9.]

Mr. Porter. Your Honor would like an opening statement?

The Court. Yes, I would like an opening statement from both counsel.

Opening Statement by Mr. Porter.

As your Honor knows, this is a copyright suit by Contemporary Arts, a Massachusetts corporation resident in Boston, against the F. W. Woolworth Company, for infringement of copyright on a design or sculpture, a so-called work of art, for a cocker spaniel dog. The Woolworth Company dog, we understand, was manufactured by the Sabin Manufacturing Company of McKeesport, Pennsylvania, which I understand is a co-partnership.

A word about the plaintiff company, Contemporary Arts. There are a few manufacturing companies in this country, your Honor, who make it their business to design fine sculptures of dogs. They make every effort to have their designs original and authentic and realistic. They copy the prize show dogs, the prize winning dogs, to the last detail, and their customers are a very select clientele, dog fancier and dog owners, who like to have facsimile models of the dogs in which they are interested, the prize winning dogs.

The whole lifeblood and existence of the plaintiff's company is the originality of their design. They have got to have it true and realistic, and when their designs are copyrighted and pirated and sold in cheap and poor copies, their business in the particular dog is just ruined overnight. Their customers say, "Why should we pay \$4 for your dog"—this particularly comes from the dealers—"when we can buy a similar dog in the five and dime stores"—as they call it—"for \$1.19."

And worse than that, they think that Contemporary Arts has sold the Woolworth Company that particular dog. They see that it is a practically identical model, and the Contemporary Arts are accused of cutting their dealers' throats, underselling them, and at the same time not caring about their goodwill and their reputation. And it really hurts them badly to have their designs copied by people like the Woolworth Company.

The particular cocker spaniel here was designed by a very well-known sculptress whose pen name is Jan Allen. Her maiden name was Elizabeth Filbrick, and her married name is Mrs. Glenn Hall. She lives out in Dedham. She is a real expert on cocker spaniels and Kerry Blue terriers which, as your Honor knows, are the national dog of Ireland. Her husband is an expert dog handler. They are people very well known in the dog world, and the fact that her designs are put out by the plaintiff company, Contemporary Arts, is a matter of great prestige to the company, which they necessarily have to protect if they are going to continue in business. And of course, by reason of their originality, the plaintiff company copy-rights all its designs.

The issues in the case are very simple, and the question is whether the plaintiff's copyright is infringed by the defendant's dog. And by the same token, is the defendant's dog copied from the plaintiff's dog?

Now, there is no issue of monopoly here, or anything of that sort. It is solely a question of design. Your Honor will undoubtedly hear derogatory statements to the effect that anybody can make a cocker spaniel dog in show position. It is true; they can, there are dozens on the market at the present time. But the point of it all is that the Woolworth Company and the Sabin Company do not have to copy the plaintiff's actual authentic design. They can make their own designs, just as much as the plaintiff company can. And of course, it is the purpose of the copyright act—and we find the copyright laws in all civilized countries where the governments are solicitous to protect the fine arts and want to encourage their artists and musicians, and their writers. These people can make their own if they want to. But no, that is much too difficult. It costs money to make your own designs and have your own designers. The easy thing is to steal the other fellow's.

And what are you going to do about it? Bring a suit, of course. And they say, "We will match the Woolworth bankroll against yours any day." And that is what we are up against.

In 1909, the copyright act, which is the present edition of it, was very greatly strengthened, to protect the artists and musicians, the novelist and the writer, against piracy. The previous copyright act was particularly unenforceable, and it really fell down, unable to serve its purpose, because defendants like these defendants could copy with impunity and the plaintiffs had difficulty in proving damages, and the results were that their victories in copyright suits were empty victories.

So the Congress amended the copyright statutes and have provided for so-called statutory damages, which allows the Court, in lieu of actual damages in profits, to award so-called statutory damages. And that is the real effective remedy under the copyright act, and if we don't have it or it is not used or invoked, the copyright act will again fall into the same sort of disrepute as it was prior to 1909. The statutory damage provision is a really effective remedy if it is used by the courts.

So that the issue in the case is whether these artists and sculptors here are to be protected in the originality of their designs, or whether their designs can be pirated at will by anybody who wants to copy them.

The Court. I suppose the statutory damage provision is predicated upon the theory that the damages are in a sense punitive.

Mr. Porter. Well, it has been ruled not to be a penalty, but actually I would say it was punitive.

The Court. That is, the amount to be assessed is to be judged by the culpability, really, of the person who is at fault.

Mr. Porter. Of the defendants, yes, sir. And of course, the real practical thing is that this infringing, this copying, this piracy, has got to be made unprofitable to these

people. Otherwise, they will carry it on indefinitely. And I may say here that the Woolworth Company is no new offender in this respect—

Mr. Barnes. Just a minute.

Mr. Porter. We had to bring suit two years ago against the same Woolworth Company, and the suit was settled a few weeks later.

Mr. Barnes. I don't think that is any part of his presentation.

The Court. I will give you my assurance that I will not be prejudiced by anything counsel might say which does not affect the merits of the case. We haven't a jury here, and you have that assurance.

Mr. Porter. What it comes down to is, are the defendants to be entitled to reap where the plaintiffs have sown.

The Court. I think Mr. Barnes' objection is a solid one, because what the Woolworth Company may have done in connection with something else which is entirely foreign to the issue here, has no relevancy.

Mr. Porter. I think your Honor is right, but I am just wondering, if people make a practice of doing this thing, when it should become a matter of judicial notice, that is all.

That is my opening, sir.

The Court. When an opening is made for the benefit of parties litigant and also for the benefit of the Court, it isn't evidence, so that you won't be prejudiced by that.

Opening Statement by Mr. Barnes.

May I say, your Honor, in briefly presenting what the defendant expects to prove here, that were my brother's remarks made in the presence of a jury, I would move for a dismissal of this case and a new trial. But having some personal knowledge of the experience of the Court, I don't think this type of argument would be effective in prejudicing your Honor against my client.

Now, if this dog of the Woolworth Company was copied, if there was a piracy, we would not be here contesting. I expect to prove, your Honor, that the Sabin Manufacturing Company—and this evidence will be offered to you—that when the service of the writ was made on the Woolworth Company, Mr. Sabin, the proprietor of the company was notified, and he proceeded in an effort to determine the origin of this dog that he sold.

Now, Mr. Sabin purchased that dog from a concern in Zanesville, Ohio. Zanesville is known as the clay city; that is the biggest center of pottery works in the country for many, many years.

Now, the company that he purchased that dog from was the Lapere Pottery Company of Zanesville, Ohio. They manufactured the dog. They made the dog. Sabin bought it, and resold it to the Woolworth Company.

Now, he found there in the Lapere plant a model of a dog that was made in 1938. He found the man who made that model, who is connected with the Lapere Pottery Company today, and he is here in court and will testify that he made the model in 1938 from which this defendant's exhibit was made up, and it was sold by Lapere Pottery Company to Sabin, and Sabin sold it to Woolworth.

Now, this man's name is Moyer. He has been in the modeling, die-cutting, and the business of making models for all kinds of subjects, including dogs, for a matter of 25 years.

Now, the model itself, which I will produce as an exhibit, was obtained in the cabinet of the Lapere Pottery Company, and he had the key to the cabinet from the time he went to work there in 1945. When he made that model in 1938, he was at that time in the employ of a company known as the Birley Company. And the Birley Company, I think, was established in 1936. And they made pottery; he will testify to that. He was there in the capacity of designing and modeling and getting up products for the market. And while he was employed

by the Birley Company, he made this model that the Lapere Pottery Company had. The Birley Company went out of business, and the Lapere Pottery Company bought some of their products and models and dies, and this dog was the model from which our exhibit was made. He went to the Lapere Pottery Company, and from 1945 until the date of this suit the Lapere Pottery Company, from moulds and dies that they had in their possession, were making and selling this dog.

Now, in 1938, when he made this model up for the Birley Company, there were many of these dogs sold all over the country. The principal distribution of that dog way back in 1938 was at the roadside stand which had pottery exhibits. And this pose of the cocker spaniel is something that all over the world for, lo, these many years, the word cocker spaniel—the dog is a pointer, and the woodcock was the game; he pointed and they got the word “cocker”, and the word “spaniel” comes from Espanol, a Spanish dog. And this particular breed of dog is a woodcock hunting dog, a cocker spaniel, and those dogs are exhibited in dog shows everywhere there is a dog show, and they are all in the same general pose.

Now, in addition to the testimony of the man who made the model of that dog that was sold to the Woolworth Company, I have here a lady who is a breeder of cocker spaniel dogs. She exhibits dogs in shows. I don't know whether she has been a judge of dogs, but her dogs have taken many prizes.

Now, in the Woolworth dog and the dog of the plaintiff company, there are very marked differences, which are easy to point out. And all those differences appear in the model or the mould that the Lapere Pottery Company had, and those points of difference in the dog of the plaintiff and the dog of the defendant will all be pointed out by an expert to your Honor.

Now, the word copyright—of course, copy means that anyone is prohibited from making a copy of a standard

article or standard breed of dog or anything of that sort. But anybody has a right to go to a dog show and make his own drawing of a dog and put that out if it is their own original work. What they can't do under the copyright law is take a model such as the plaintiff has here and make a copy of that model. And we have the law very carefully worked out, your Honor, and we will submit it at the close of the evidence.

And I submit to the Court that the entire proof offered by the defendant will, by substantial evidence from witnesses, show that there is no infringement, from the very fact that we built this dog, my witness Moyer created this model, four years before they got the patent, and that he went to the Patent Office after this suit was brought, Mr. Moyer, and got a copyright of his dog that he has there. Your Honor, I assume, would take judicial notice of the fact that the copyright office is tightening up a bit and there is some search made as to prior copyrights.

Mr. Potter. I would deny that, sir; that is not the practice in the copyright office. They make no search. They rely on the oath of the applicant.

Mr. Barnes. That copyright, after this suit was brought, was granted, and we will offer it for whatever it is worth, on a model that this man himself made when he was with the Birley Company in 1938.

Now, that is the defense to the action.

The Court. You have this dog copyrighted?

Mr. Barnes. It is copyrighted in 1950.

The Court. You don't dispute that, Mr. Porter?

Mr. Porter. I don't know anything about it, sir, but I will tell your Honor that I could go down today with the plaintiff's dog, with an application, and come out with a copyright.

The Court. Is it in dispute?

Mr. Porter. I don't know anything about it.

The Court. Have you the copyright?

Mr. Barnes. Yes, your Honor.

The Court. Would you show it to Mr. Porter?

(Mr. Barnes complies).

Mr. Porter. I will just let Mr. Barnes offer it.

The Court. That is all right.

Mr. Porter. And let him say what he says it is.

[Copyright of the defendant marked Defendant's Exhibit B.]

Mr. Barnes. May I say, in closing my opening remarks, your Honor, that I have attempted in the opening to state to the Court merely what we propose to offer, and I will reserve the argument for a different time.

The Court. I understand. Now, is it agreed that that is to go in as Exhibit B, showing the registration of the dog described in Defendant's Exhibit A?

Mr. Barnes. Yes, your Honor.

The Court. Does counsel agree to that?

Mr. Porter. Your Honor, I know nothing about that. I will just have to accept it for what he says it is.

The Court. Well, if not, he will have to prove it.

Mr. Porter. I would rather have him prove it than to state what it covers. He says Mr. Moyer is here, and he should prove it. I would like to know what dogs it covers or is supposed to cover, and all that sort of thing.

The Court. All right, it may be marked for identification.

[Defendant's Exhibit B is withdrawn from evidence and marked Defendant's Exhibit B for Identification.]

The Court. All right, Mr. Porter, you may proceed.

FRED PRESS, sworn.

Direct Examination by Mr. Porter:

Q. Mr. Press, will you please state your name, age, residence and occupation? A. Fred Press, 30 years old; I live at 23 Studio Place, Boston, and I am at present the chief designer for Contemporary Arts, Inc. in Boston.

Q. And as chief designer for Contemporary Arts, what do your activities consist of? A. Of sculpturing models and designing the coloring for them; original models, I might add. I also serve as general designer for the sculpture of most of the models that Contemporary Arts produces.

Q. Are you also an artist? A. Yes, I paint, also.

Q. How long have you been employed in that capacity by Contemporary Arts? A. Eleven years.

Q. Are you an officer of the company? A. Yes, I am clerk of the company.

Q. Will you state briefly the nature of the business of Contemporary Arts? A. We are occupied in the designing and manufacture and sale of small sculptured figurines.

Q. Will you state the principal parts of your business, the kinds of figurines you design and sell? A. Well, we have two major groups. One is figures involving dance objects and national objects. The other main part is dog models.

Q. Do you have a catalog of your company which shows the figurines which you design? A. Yes, this is it (indicating).

Mr. Porter. May I offer that in evidence?

Mr. Barnes. I would like to look at that (doing so). I object to that on the grounds of relevancy. I don't see that that has any application to any of the issues in this case.

Mr. Porter. Of course, it shows the plaintiff's line of sculptures.

The Court. That isn't disputed, is it? The business consists of two types; "one is figurines," as they are called, and the other is a line of business such as these exhibits indicate, dogs.

Mr. Barnes. Isn't that enough, your Honor?

The Court. Do you need anything more than that?

Mr. Porter. The cocker spaniel dog is shown in that catalog also, No. 271.

The Court. I think it would be competent on that question. I will let it go in, Mr. Barnes, and you have my assurance that I won't be prejudiced by anything except that which would be germane to the issue here.

Mr. Barnes. All right.

[Catalog of the plaintiff company marked Plaintiff's Exhibit 10.]

The Court. And I understand this is offered for the specific purpose of showing the design of a dog.

Mr. Porter. Yes, sir.

The Court. You understand, Mr. Barnes, it is only offered to show the design of a dog, and that is all.

Mr. Porter. The plaintiff's dog.

Q. Would you point out the cocker spaniel which is the subject of this suit in that catalog? A. Yes, it is on page 1, and it is numbered 271, dog No. 271.

Mr. Porter. Would your Honor like to see that (showing catalog to the Court)?

The Court. So that there will be no misunderstanding on it, this is a catalog, the title being "The Contemporary Collection", and No. 271 on page 1 is the design of a dog.

Mr. Porter. Which is the subject of this suit.

The Court. Yes.

Mr. Porter. At the same time, I would like to call your Honor's attention that the catalog shows the type of work that is done by the plaintiff, and that they are original designs, and it is pertinent in that respect on the issue of damages.

Mr. Barnes. I don't think there is any proof that they are original designs.

The Court. I suppose evidence showing the character and nature of their business is competent, anyway. I will admit it.

Mr. Porter. Thank you.

Q. How many different designs in sculptures do you have in the Contemporary Arts line which you are currently selling? A. Currently we are selling about 250 models.

Q. And how many of them are dogs? A. About 100.

Q. Will you state whether or not those various 250 designs which you have spoken of are original designs of Contemporary Arts? A. Yes.

Mr. Barnes. Well, just a minute, your Honor. He is confining his examination to a particular dog. Is it any help to the Court to go into a lot of other—?

The Court. Well, I am not going to try 100 dogs. One of the issues arises out of an alleged violation of the copyright laws by the defendant company in connection with a dog that is referred to as model No. 271 on page 1.

Q. Will you state whether or not Contemporary Arts has designers which it employs for designing its various works? A. We have a select group of designers upon whom we call occasionally to do original models for us, yes.

Q. And who is Jan Allen? A. Jan Allen is the sculptress who designed and sculptured the model on commis-

sion from us, the model of the cocker spaniel in question here.

Q. And which in your catalog is No. 271? A. Yes.

Mr. Barnes. I object.

The Court. I suppose your objection is because it is predicated on hearsay?

Mr. Barnes. Yes, your Honor.

Q. Do you know that of your own knowledge, Mr. Press?

A. Yes.

Mr. Barnes. Well, I don't see how he could, your Honor.

The Court. He said he has been with them for eleven years.

Mr. Porter. He is another one of the designers.

Mr. Barnes. If she were here as a witness, it might be proper evidence. But, coming from this witness, I can't see how he can testify.

The Witness. I commissioned—

Mr. Barnes. Just a minute. We have an objection before the Court.

The Court. I think in its present form, I am going to exclude the question.

Q. Well, will you tell us who Jan Allen is, please, if you know her? A. Jan Allen is a sculptress who does work for Contemporary Arts on commission from us. Jan Allen is her pen name. Her maiden name was Elizabeth Filbrick. She is now married, and her marriage name is Mrs. Glenn Hall.

Q. Where does she live? A. In Dedham, Mass.

Q. Will you state whether or not at any time you commissioned her to design a cocker spaniel dog sculpture?

A. Yes, in 1942 we commissioned the designing and sculpture of a cocker spaniel dog by Jan Allen.

Q. And can you state whether or not that cocker spaniel dog which you commissioned her to design is shown in

your catalog there? A. The dog which she designed for us is listed as dog No. 271 on the first page of our catalog.

Q. Were there any reasons why you commissioned Jan Allen to make this cocker spaniel dog? Can you give anything on her qualifications which led you to commission her? }

Mr. Barnes. I can't see how that is of any consequence.

The Court. Isn't she available as a witness?

Mr. Porter. We were planning to get her in, and she can be available.

The Court. If she were here, a lot of these questions wouldn't be objectionable.

Mr. Porter. Of course, this man is an officer of the company.

The Court. He is clerk of the corporation.

Mr. Porter. The company is run by the two men, Mr. Press and Mr. Fox.

The Court. There is nothing in the title of clerk of a corporation which would indicate power to speak for the corporation. He is not a director, is he?

Mr. Porter. Can we ask him if he is acquainted with Mrs. Allen and knows her standing and position in the dog field?

The Court. I don't suppose there would be any objection to that, would there?

Mr. Porter. The lady is a celebrated sculptress and dog expert, and if Mr. Barnes doesn't know it, we can bring the lady in herself. But his own people will probably tell him that.

Mr. Barnes. I don't object to the build-up, if it will help the Court in any way. But they have here a copyright of a dog. What is the difference whether she is celebrated—?

The Court. It is agreed that this dog is a dog which was designed by this lady and that it was copyrighted in 1942.

Mr. Barnes. What more do they want?

The Court. I suppose the scholastic standing of this sculptress is not one issue at stake, is it?

Mr. Porter: No, but it is a reason why the Woolworth Company and the Sabin Company want to copy it, because of her standing in the field.

The Court. Is there anything about the physical make-up of the dog which on its face would show that it was designed by her?

Mr. Porter. Oh, yes, sir. Her name appears on the copyright notice of every dog that is sold, "Jan Allen", with a big "C" in a circle, and the name "Contemporary Arts" frequently does not appear, although on the porcelain model—

The Court. You mean on anything that Jan Allen designs?

Mr. Porter. Her name, "Jan Allen", appears on every dog.

The Court. You want to show that her name is a distinctive name in the market which deals exclusively with the sale of dog designs?

Mr. Porter. Yes, sir, and it particularly carries weight with the customers of Contemporary Arts.

The Court. Go ahead. It is admitted on those grounds.

Q. Will you state your knowledge of Jan Allen's standing in the profession as a sculptress and dog expert? A. Yes. She first of all is an excellent sculptress. She has been sculpting dogs for many years and is a graduate of the Massachusetts School of Art.

The Court. I think, as a matter of fact, that she ought to come in. Let me say this to you now, Mr. Barnes. It is pretty hard to exclude evidence

in a case like this that has to be judged later on. And as a matter of fact, without any motion on the part of either of you, I want you to remember that the respective burdens on the shoulders of counsel will have to be carried by counsel, and the weight and value will have to be the beacon lights. In other words, I will disregard anything that I feel is not relevant, even if I let it in now. I don't know how else I can do it.

For example, suppose you had a doctor who is testifying as a famous orthopedic surgeon. You wouldn't put some other fellow on the witness stand and have him testify as to what his qualifications were; the man would come himself. And I see no different yardstick for measurement than that. I don't think you ought to ask this witness questions that should be set aside for her.

Mr. Porter. Well, sir, it is only in this respect.

The Court. If Mr. Barnes does object to it, I have to recognize it.

Mr. Porter. Well, how do we prove the standing of any artist in the country?

The Court. The same way you prove the standing of any medical expert. He takes the stand and qualifies as such.

Mr. Porter. Of course, he blows his own horn, as it were.

The Court. That is all right.

Mr. Porter. But people who know him—and this man is one who knows the lady's standing.

The Court. If it goes unchallenged, it has to be accepted.

Mr. Barnes. Well, I say that it is hearsay evidence that comes from somebody else. I can't see the use of taking up the time of the Court with a lot of irrelevant things. As a matter of fact, the copyright is in, and the dog is in. What is the difference?

The Court. I am only admitting in the light of the fact that he apparently is sort of manager of this company. He has testified to a distinctive mark on the designs of this lady wherever they are offered for sale, "Jan Allen", as I understand it.

Mr. Porter. "Jan Allen" is the name that appears on every dog.

The Court. And that it has a distinctive value in this market, because these animals are animals purchased usually by people that have a definite knowledge of the history and strain of each dog. Is that your position?

Mr. Porter. Yes, sir.

Mr. Barnes. There is no contention made by the plaintiff that the defendant has put the name Jan Allen on any of the articles we have sold. So that certainly what we have sold, nobody buys on the Jan Allen name.

Mr. Porter. Except that people know that Woolworth dogs are copies of Jan Allen originals.

Mr. Barnes. Just a minute. Certainly if we had a jury here, we would ask to have the case—

The Court. Mr. Barnes has made the statement that the dog that was sold by the Sabin Company to the Woolworth Company has no mark of Jan Allen.

Mr. Barnes. That is right, your Honor.

Mr. Porter. He made the remark, your Honor, but it has no bearing here; this is not an unfair competition case. We are alleging copyright infringement, that they copyrighted our copyrighted dog.

The Court. I have only admitted this evidence for the narrow purpose of showing that the dog that was designed and registered in the copyright office was the type of dog that was marked "Jan Allen".

Mr. Porter. Yes, sir.

The Court. Now, if I left it in for that purpose, it does seem to me that counsel has a right to respond to that claim by saying—in other words, their position is, “We never heard about this registration; we bought a dog from Sabin Company which was sold in our various retail stores for a certain price, \$1.19, and it had no mark of Jan Allen on it”. I think if you can draw an inference from one side, there should be sort of a reciprocal understanding that counsel could argue it the other way.

Mr. Porter. Well, of course, it comes down to this; these people are in the business of making authentic designs, and they hired—

The Court. Well, it is agreed that they hired Jan Allen for reasons which are in keeping with the character and nature of the business. And the Court would have a right to infer the character and nature of the business and that they were trying to hire the best sculptress they could get. So that you don't have to prove that.

Mr. Porter. This matter of original design, of course, is the very lifeblood of the plaintiff's business.

Mr. Barnes. Just a minute, your Honor. That is argumentative.

The Court. I have no objection to his describing the nature of the business. Mr. Barnes won't object to that. You have been the general manager of the business, haven't you?

The Witness. Well, I am chief designer. It amounts to that, yes.

The Court. What is the nature of your business?

The Witness. We design and manufacture sculptured figurines.

Mr. Barnes. Figurines?

The Witness. And dogs, or animals.

The Court. And when you do that, are they usually registered in the copyright office?

The Witness. All of them are copyrighted.

The Court. And they are designed for the purpose of putting them on the market?

The Witness. That is right.

The Court. And your business comes from the sales of these various designs?

The Witness. Yes.

Q. Have you designed any of the dogs sold by Contemporary Arts yourself? A. Yes.

Q. How many? A. Five.

Q. Which are they?

Mr. Barnes. Just a minute. If it isn't this dog, how is that of any consequence here? If he designed this dog, I don't object. But if he designed five other dogs not in issue—

Mr. Porter. There was a follow-up question, sir, to bring out the effort that they make in making their dog designs true to type, showing that Mr. Press himself has designed some of their dogs.

The Court. I will admit it and save time.

The Witness. I have done a boxer, a German shepherd, a Beagle, a Dalmatian, and just recently a cocker spaniel to replace the one that was infringed.

Mr. Barnes. I object to that.

The Court. That part may go out. To replace

o No. 271?

The Witness. Yes.

Q. In making your dog designs, will you state whether or not you make any effort to make them true to the type of dog you are portraying? A. We make every possible effort, yes.

Q. What do you do in that respect, in designing a particular dog? A. Well, we generally start by doing as much research as we possibly can, and that entails the research of the basic anatomical structure of the dog, starting with the skeleton and muscular development, and so forth, which is to the dog the most important part. As I develop a piece of sculpture and get it to a recognizable point, I then call in dog experts to look at the dog and to criticize it, and from the notes that I take from their comments I rework the dog. This is repeated several times until we both are in accord and feel that the dog is exactly as it should be.

Q. Do you ever work from actual dog models, prize winning dogs? A. Yes, we have contact with the kennels, so that we can call on their various champions which can be used to work from.

Q. Now, you have already told us that in 1942 you commissioned Jan Allen to design a cocker spaniel dog, which is No. 271? A. Yes.

Mr. Porter. And your Honor, we have already offered in evidence the plaster and two porcelain models which embody the Jan Allen design which are Plaintiff's Exhibits 5, 6 and 7 respectively.

Q. When Contemporary Arts sells this cocker spaniel dog which we can identify by No. 271, with the Jan Allen name on the left hind foot or leg—that is in the plaster model—will you state whether or not all your No. 271 cocker spaniel dogs bear a similar notice of copyright? A. Yes.

Q. On the porcelain models, am I correct that it appears on the foot? A. Yes.

Q. And is that glazed into the porcelain? A. Yes, that is applied with glaze and fired into the dog.

The Court. Mr. Porter, could I see one of them?

Mr. Porter. Yes, sir (showing to the Court). That is in compliance with the copyright statute

as to putting notice on every copy that is sold. It is notice to the public that the dog model is copyrighted.

The Court. Is this stamp on the side usual?

The Witness. On the porcelain dogs.

The Court. On the porcelain dogs only?

The Witness. Yes.

The Court. What were the types of dogs that were sold? Porcelain?

The Witness. Both.

The Court. By the Woolworth Company?

The Witness. Oh, no, just the ceramic.

The Court. The dog that you offered, Mr. Barnes, Exhibit 1 of the plaintiff, and Exhibit A of yours, that is not a porcelain dog, is it?

Mr. Porter. We call it a ceramic.

Mr. Barnes. Ceramic, yes.

Q. Can you tell us the date when these Jan Allen dogs, No. 271, were first published? A. Well, I know the year.

Q. Do you know the date of publication. (showing paper to the witness)? A. March 26, 1942.

Q. You are referring to the time of publication as it appears on the copyright registration? A. Yes.

Q. Taking this plaster model of the Jan Allen cocker spaniel, would you briefly describe the technique of making a design for that kind of dog? A. Well, yes, the early—

Q. And the method of manufacture? A. The early work involved, or the beginning work, is the plasterline model which I described. It is built in a soft pliable material so that it can be easily changed.

Mr. Barnes. May it please your Honor, it hasn't appeared that he designed that dog. I don't know whether the testimony is for the general practice of the business or something like that, but he is not the designer of this dog. Jan Allen is the one who did it.

Mr. Porter. Mr. Barnes misunderstands the nature of the present testimony, sir. Mr. Press, of course, is the designer, or operating designer, shall we say, for the company, and he was going to explain the manufacturing technique.

The Court. He was the operating designer, he was the general designer, the chief designer and then he became the general designer and has been in that capacity, I think he said, for five or six years.

The Witness. Eleven years.

The Court. You were with them for eleven years and then your position changed so that you became the general designer?

The Witness. No, it has been the same.

Q. Will you state whether or not you are in charge of production of Contemporary Arts? A. Yes, I am.

Mr. Porter. I merely wanted him to briefly explain the manufacturing technique of these various types.

The Court. They are put in a mould, aren't they?

The Witness. Yes, your Honor.

The Court. Taking as the yardstick the design of the artist?

The Witness. Yes.

The Court. And what you are going to describe now is the method by which that mould was set up?

The Witness. Yes, sir.

Mr. Porter. That the plaster model kind of dog is made.

The Court. You don't object, in the light of that?

Mr. Barnes. No.

The Witness. Well, as I say, the original model is designed in a pliable plasterline so that on comment of the dog experts we call in, we can make our changes. And when we finally have arrived at what we think is the perfect cocker spaniel, or whatever the dog may be, we then must transfer it into a more durable material. And for our purposes, plaster is most easily used. So on that plasterline model, the pliable model, we must make a mould, and we make this mould in several sections so that it can be removed—it is a plaster mould, incidentally—so that it may be removed from the plasterline model. On doing that, the plasterline model is destroyed, and the only remaining product is the cavity which exists in the mould. From that point, we fill that cavity in here (indicating). It is our business to remove the mould without destroying it entirely, and so we chip the mould away, and we find now that we have the plaster model, which is all that exists of the original model and it is considered the original. Now, that plaster model can be used from that point on in making production moulds.

In order to produce dogs in plaster such as this (indicating), we make use of a rubber mould, and rubber is poured over the plaster dog, and from there on production can proceed from the rubber mould in plaster.

However, in producing a dog in ceramic or porcelain, or ceramic of any type—and I might mention that the word ceramic is a generalized term used to cover all of the baked clay field—a different kind of mould is required, and that is a plaster mould, which must be made on the plaster dog.

Now, before that can be done, the plaster dog must be altered in order to more easily fit the demands of ceramic. Since you are having a plaster mould, it won't pull away, for example, from an undercut, whereas a rubber mould would. So the dog is altered to make it possible to pull away these various sections of the moulds. The plaster mould is made over the plaster dog, the dog removed,

and from there on it is a question of pouring your ceramic clays into that plaster mould.

Q. The rubber mould? A. No, into the plaster mould, in order to create ceramic. Now, part of the process involved there is to allow the ceramic clay to settle in that plaster mould for a length of time so that part of the moisture of that clay is absorbed into the plaster. When such time has elapsed, the remainder of the clay is poured out, and a thin wall of clay remains inside of the mould where the moisture has been drawn out; it is sufficiently intact so that it doesn't crumble and fall apart. And the sections of the mould are removed and that piece is then covered with a filler of glaze, and it is highly fragile, and it is then placed in an oven, generally termed a kiln in ceramic, and baked at a very high temperature.

Now, our particular porcelain pieces are baked at 2,300 degrees. That is considerably higher temperature than in the ceramic, than the baking point or firing point in the ceramic, and that accounts for the reduction of size which you may notice. The porcelain dog is considerably smaller than that (indicating).

Q. Than the plaster dog? A. Than the plaster dog, because a great deal of shrinkage takes place in the firing. If the firing is at a lower temperature, not so great a degree of shrinkage would take place, as you notice the Woolworth dog is slightly larger than our porcelain dog.

And that generally covers the field, except that we apply to our ceramic dog a further treatment of hand detail over the body glaze, which involves extra expense, and then it must be fired again in order for that glaze to become absorbed into the first glazing.

Q. Would you briefly explain the finishing operation that you do on the plaster dog? A. The plaster dog is taken, as I said, from a rubber mould, because it is harder material, it is solid for one thing and can stand the contact of the rubber as it is being pulled away from an undercut, for example.

When it is extracted from the mould, there are mould seams. The mould has to be cut in certain spots so that it facilitates removing the dog. These mould seams have to be cut away and then trimmed by finishers. They cut these seams off and repair any possible bubbles or imperfections that may have occurred. And then the dog is given an overnight drying in a drying room at about 120 degrees temperature. This is to force all the moisture out of the plaster figurine. From there, it goes into a spray room where it is sprayed in order to create this particular coloring. We use two colors, one over the other. When that is completed, we apply hand detail in the eyes and on the nose, and then the entire thing is covered with a glaze which requires an overnight drying, and the next morning it is ready, generally, to be wrapped and packed.

Q. What is your retail price of this plaster model? A. The plaster model—this plaster model retails for \$4.

Q. And what is your manufacturer's selling price? A. We sell the dog for \$2.

Q. And is there an agent's discount there? A. Yes, the agent gets 25 per cent.

Q. So that the net price to Contemporary Arts is \$1.50 on the plaster model? A. Yes.

Q. Would you just briefly enumerate the steps which you have just covered which are particularly costly, and those which are inexpensive to Contemporary Arts, in the making of that plaster dog? A. The first and most costly step of all is the actual designing of the model, of the figure of the dog. The second expensive step, I would say, is the reproducing of that plasterline model in plaster. That is, the mould which I described is again a very detailed hand operation and so is second on the list of expense. Your third expense would be involved in making your production moulds. And from then on, the more moderate costs are involved in producing every individual dog, which is done through the procedure I explained; it is cast in a rubber mould, the mould seams trimmed, it is dried, painted and glazed, and then wrapped and packed.

Q. Did you give any ranking to the hand finishing operations, around the head, for instance, in those costs? A. Well, on that particular one, the plaster dog, it is not too long an operation; it does call for considerable care, because the points that are done by hand are all isolated and all entirely different from the coloring on the rest of the dog, and that must be done with extreme care or it would spoil it.

On the porcelain, there is an operation of an even more careful procedure around the eyes, nose and muzzle of the dog, because for one reason the paint used is extremely difficult to coat with; it is a glaze, which is a mixture of ground glasses, little particles of glass. After that is applied, it must be fired again so that this glaze will fuse into the first glaze.

Q. Would you briefly describe your manufacturing technique in making a porcelain dog? And do I understand correctly that you start from a plaster working model such as Exhibit 5 here? A. Yes.

Q. Then, briefly describe the manufacturing technique for the porcelain? A. Well, once the mould is made, the plaster mould, which necessarily must be made in several sections so that it can be drawn away easily from the model, the mould cavity as stated before is filled with ceramic clay, which is entirely different from the plaster used here. And that is allowed to stand for sufficient time for a certain amount of moisture to be absorbed into the plaster mould. When that happens, the balance of the clay is poured out of the mould, and the mould is removed from what is now a poured out clay model of the dog.

At that stage—something I didn't mention—the ceramic dog is at the same height or size as the plaster one. The plaster mould has a cavity which corresponds with the size of the plaster dog. That model is allowed to be air dried, and there is a very slight shrinkage in that air drying, but not sufficient to be too apparent. Then the dog is generally sprayed or dipped into an overall coloring

of glaze, and then it is placed in a kiln or oven to be fired at a high temperature. When that happens, all the moisture is drawn out of the clay and the clay shrinks to the size you see here. All the particles of flint and material that composes that clay crystallize and become extremely hard. The glaze which was applied fuses. The glaze, as I said, is particles of glass, and they all fuse together and give you a very fine shiny surface, and also fuses into the clay body. And that generally is the process of producing a piece of ceramic.

Q. And what is the retail selling price of your red porcelain dog here? A. This red one is \$9.

Q. And what is your manufacturer's selling price? A. \$4.50.

Q. And again a 25 per cent commission for selling to an agent? A. Yes.

Q. Now, do I understand that your black and white porcelain dog, Exhibit 7, goes through similar steps as your red porcelain, Exhibit 6, except for the different coloring? A. Well, yes, and also the fact that that all the black areas you see here and the slight buff area require more hand treatment than this (indicating), and so it is far more expensive. This one retails for \$9, and this one here (indicating) has got to retail for \$15.

Q. Referring to the black and white porcelain, Exhibit 7? A. Yes.

Q. And again your manufacturer's selling price on your black and white \$15 porcelain—? A. Would be half, \$7.50.

The Court. It is your position, isn't it, Mr. Porter, that these three types of dog designs that have been referred to are designs that come from the No. 271 of Jan Allen?

Mr. Porter. Yes, sir, they are the Allen No. 271 design, all three different types, plaster, red porcelain, and black and white porcelain.

The Court. I think we will take the recess now.

(Short recess.)

Q. Mr. Press, when you first started selling your red porcelain dog on the market, how long ago was that? A. About three years ago.

Q. 1947? A. Around that time, yes.

Q. And tell us whether you regard the red porcelain and black and white porcelain dog as the same model except for the color? A. Yes; they are exactly the same except for the coloring.

The Court. Was that the first dog that was sold under that copyright?

The Witness. The plaster model was the first.

The Court. When did they start to sell that?

Mr. Porter. That was started in March 1942, that day of publication on the copyright.

The Court. What date?

Mr. Porter. Exactly, it was March 26, 1942.

The Court. That is the date of the registration of the copyright. I mean when they started selling it.

Mr. Porter. That is the official date of publication; we have to put it in the copyright certificate.

Q. Now, at some time, Mr. Press—I believe it has already been sufficiently brought out—you found a cocker spaniel dog sculpture being sold by the defendant F. W. Woolworth Company, and we understand that you bought the model which is Plaintiff's Exhibit 2 from the Woolworth Company on Fifth Avenue, New York? A. Yes.

Q. Will you look at that model, Plaintiff's Exhibit 2, and state briefly—well, characterize it as to its type of ceramic or its type of sculpture? A. I wouldn't attempt to say that the formula was involved in the content of the clay, because most potters or ceramists have their individual formulas. However, it does come under the general classification of a ceramic. I consider it, from the appearance of the bare spots and from the fact that it is chipped in one spot, to be of an inferior body than our porcelain, because I have experienced a good deal

of this, and a blow hard enough to chip this piece, as you can see it is chipped on the bottom, would have smashed our piece, indicating that it is a rather weak body which would give way in one particular section rather than retain its full composure until it was smashed entirely. So I feel that it is of an inferior grade of clay than ours.

Q. Can you state anything about it from your knowledge of the process of manufacturing of a dog model of that type? A. Yes, I can. Basically, the same procedure would be gone through. The mould would be made on a plaster original. The model would be cast in very much the same manner as our porcelain model is cast. It is treated with a single glaze, which is a drip glaze of some sort, or a running glaze which settles into low areas and leaves the high areas rather light, which was the reason for carving these marks in the side, in order to give the dog a texture. Now, this was fired once with the glaze already on it, in contrast to our dog which was fired twice, with the first glaze, and then the second more detailed glaze.

Mr. Barnes. Do I understand, may it please the Court, that this witness is giving his opinion? He certainly can't testify to facts on that. Is this opinion evidence as an expert? I don't know what the purpose is.

Mr. Porter. I think that would be his opinion as an expert.

The Court. I am allowing the evidence on the basis that he has qualified to give this opinion, and I assume it is predicated on his experience and training that he has already testified to.

So you will understand me, Mr. Barnes, I have admitted that only on the basis of the fact that he has had sufficient experience on which to predicate the conclusion that he is an expert. I am not admitting it on the basis that it is so, but just as evidence. The weight of it will be for the Court, to be

modified by such cross-examining methods as you use. In other words, I am not admitting what he says as so, but because it is his opinion.

Did I understand you correctly, Mr. Witness, that if that has a chipping on the foot, indicating that there was an application of a little bit of force, if that happened to your model it would have broken to pieces?

The Witness: I won't say that the same thing would happen in every instance. But generally speaking, a force that would chip a piece off this and leave the rest intact—

The Court. Would break the other?

The Witness. Would normally smash the other, either smash it or do nothing to it at all.

Now, in regard to the question you asked about the details. You see, in a plaster model, we can bring out subtle characteristics; the incisions do not have to be as deep, because very little is lost in casting the model. However, there is so much beyond individual control in producing a piece of ceramic—and by that, I mean when ceramic is cast and placed into a very hot kiln, things happen that are out of your control until you can remove that dog, after which time they are even further out of your control because the dog is finished and nothing can be done to it.

Well, a very thick syrupy glaze has to be applied to this dog. And it is well known in the ceramic field that the glaze is unpredictable and very seldom appears exactly the same on two pieces. I can point out, as a matter of fact, that that particular dog is a little darker in spots than this (indicating).

Q. Referring to the second Woolworth dog, Defendant's Exhibit A? A. Yes, that there are very slight variations, but still they do not destroy the similarity of the two dogs. So in order to control that as far as it is possible to do so, a dog which is normally designed for

plaster production which is intended to be produced in ceramic would have those details incised or carved deeper so that if and when they were filled with a heavy glaze, they would not be lost entirely. And so that is what happened here. However, on our own dogs, we feel so strongly about this particular model that our mould maker was instructed—

Mr. Barnes. Just a minute. I don't know how far you want him to go on this line. But maybe it would be shorter to let him go ahead.

The Court. As I have told you, Mr. Barnes and Mr. Porter, I am going to have a factual brief and a legal brief from each side, and I am going to give you plenty of time to get it ready, and you can be certain that I will do my best to separate the wheat from the chaff.

Mr. Porter. I have always felt that way, your Honor, that when a Court is sitting alone, an experienced judge, you don't have to be worried half so much about the rules of evidence.

The Court. I don't know about the experience. I will try to use my experience as a practicing attorney.

Q. You might continue, Mr. Press. A. The point I was trying to state was that we feel strongly, and have right along felt strongly enough about the model that we instructed our mould maker, in altering that model so that it could be produced in ceramic, to alter as little of the characteristics of the dog as possible, and we would take care of the facial expression and detail in that second glazing, which we have done, as you can see.

Q. And you are referring to your red porcelain model, Exhibit 6? A. Yes, the black nose and the mouth and the eyes, and so forth.

Q. Will you now please look at the Woolworth dog, Plaintiff's Exhibit 2, and your own plaster model, Plaintiff's Exhibit 5, and state whether or not in your opinion

you believe that one was copied from the other, and state your opinion in that respect? A. Well, it is my opinion that this dog (indicating) was reproduced from a mould made directly from one of our dogs.

Q. A plaster dog? A. From one of our plaster dogs, yes.

Q. And why do you think that? Go over it in detail and point out the similarities. A. I might point out that in sculpture, you could perhaps put half a dozen sculptors in the same room with a model, all of them working from the same model, yet you would arrive at six separate interpretations of that same piece of sculpture. The anatomical structure might be acceptable and might be perfectly all right, but it is well known that each sculptor, or each painter, or anybody in the arts, without any special attempt on his part, stamps his own personality or individuality on the work he produces. And it is that individuality that I recognize in this dog. There is too much of it to be considered coincidence. If by some very vague circumstance or some rare circumstance, even the anatomical structure was considered coincidental enough to be doubtful, it is highly improbable that the variations in the hair detail—I could point them out.

Q. I wish you would point them out.

The Court. Now, so that the court reporter will have it clear on the record, what you have in your hands now are two exhibits of the plaintiff, Exhibit 5, which is the plaster, and Exhibit 2, the Woolworth dog,—so-called.

The Witness. Yes, sir.

The Court. All right, continue.

The Witness. Well, there may, as I say, by some far-fetched chance which I can't picture, be a resemblance in the anatomical structure. But where hair detail or superficial detail is involved, the situation depends on the whim of the sculptor. And where there are similarities, such as two points of hair protruding here (indicating), a curl on the right side here, and a curl on the right

side here (indicating), where the similarities and basic structure and design of the hair pattern are so exact, there couldn't possibly be a coincidence involved, (and it is my opinion—.

Q. And can you go further around the rest of the animal and point out similarities of that nature, referring to the bottom of the dog? A. There are similarities here (indicating) where there are points of hair one, two, three, and points of hair one, two, three, the same situation occurring there (indicating). The only differences involved are wherever the variation was made to facilitate removal of the kind of mould required on this particular ceramic.

Q. Referring to the Woolworth dog? A. Yes. It was necessary to pull a solid hard object out of there, so that had to be poured out.

Q. And you are referring to the portion between the hind legs of the Woolworth dog? A. Yes. It had to be made so it would draw easily. Here [indicating], of course, we had a flexible mould and it could be pulled around. But there is no mistaking at all the similarities of points which would never be the same if two sculptors were working on individual models.

Q. And will you look at the rear end of the dog and see if you see similarities as to hair conformation? A. The conformation is the same in through here (indicating).

The Court. What do you mean by conformation?

The Witness. The direction that the hair takes on, and the general proportions of masses of hair.

Q. Those little protuberances of hair; is that what you are referring to? A. Yes, they are all the same, with the exception of allowance made for production in the ceramic.

Q. And would you point out dissimilarities which you have stated are inherent in the ceramic process of mak-

ing the Woolworth dog? A. Well, you see, the sculpture here [indicating] is rather subtle.

Q. Referring to the—? A. Head and face. The sculpture of the hair detail over the surface is subtle, no more in some instances than just the application of the tool that can be seen. Here (indicating) even the tool mark was eliminated because of the process involved in the production of the ceramic.

Q. And you are referring to the red—? A. To the red cocker.

Q. The porcelain cocker, Exhibit 6? A. Yes. Here (indicating), where we intended to apply color detail to define the mouth and nose and eyes, and so forth, we didn't allow any demarcation in the original model. We didn't want that altered, and we took care of it in these later steps. However, here in the Woolworth dog, where one firing was the aim in order to produce it more inexpensively and cut down the number of steps, these areas were designed by carving with a plaster tool.

Q. And you are referring now to the mouth—? A. Mouth, nose, eyes and hair, detail over the surface of the body, so that this particular type of glaze, which runs and settles into low areas, would settle in those areas and thus cause a textural effect and a considerable number of facial detail, which would be more difficult to produce in this manner (indicating).

Q. I notice that the Woolworth dog is slightly larger than your porcelain dog which you also say is made from your plaster model. Will you explain the reason for that?

A. In the mixture of various clays and through the application of varied heat processes or heat temperatures in the kilns, there is a fluctuation of shrinkage, even in our own models, although the fluctuation is very, very subtle. There is a slight variation in the general height or proportion of the dog. So that this (indicating), being made of an inferior clay—which I am sure it is—and fired at a lower temperature to facilitate cooling

faster and faster production, shrunk—if there is such a word—less than the ceramic.

Q. Or your red porcelain? A. Yes.

Q. Now, I notice that there are rather fine hair lines on the Woolworth cocker which do not appear on your model. Will you explain how those were made if, as you say, the Woolworth dog was copied from your own plaster model? A. Well, as I say, more detail, more subtle detail can be obtained in reproduction in this plaster—.

The Court. The witness has Exhibit 5?

The Witness. Yes. More detail can be produced out of the rubber mould. Well, in order to create that textural effect and to exaggerate it, the original model, a plaster model such as this with no color on it, such as this one, perhaps—.

Mr. Barnes. May I interrupt one minute? Is this one an exhibit?

Mr. Porter. Well, I will let him complete his answer.

The Witness. This model, for example, stripped of its paint, would serve as a model, which could then be incised; if it were soaked in water it would then be soft enough to cut into the surface, creating lines like this [indicating], which could afford textural effect to the dog, and that is what I believe happened in this instance.

Q. And can you produce one of your own—shall we call them raw conditioned models, and very briefly show the Court how those incision lines are made as appear on the Woolworth dog? A. May I use this (indicating)?

Mr. Barnes. Is that an exhibit?

Q. Well, will you state what this model is? A. This is a raw plaster cast, exactly what this was before it was colored (indicating).

Q. And you are referring to the plaster model, Exhibit 5? A. Yes.

The Court. Are you offering it?

Mr. Porter. Yes, we will offer it as Plaintiff's Exhibit 11.

[Raw plaster cast of plaintiff's cocker spaniel marked Plaintiff's Exhibit 11.]

Q. Now, on Plaintiff's Exhibit 11, the raw model; there is of course no surface paint? A. That is right.

Q. But tell me if the situation would be the same if the paint were removed by a suitable solvent from one of your plaster models? A. Yes, it would.

Q. Would you now please demonstrate to the Court how these fine hairline incisions would be made on one of your plaster models to produce the Woolworth dog in ceramic? A. Yes. Well, I have got with me two commonly used plaster tools, that are common to those used in plaster shops, and they are used either to make incisions, or the spatula end is used to fill in holes or imperfections. And in order to make incisions such as that, you would need merely to scratch the surface of the dog. I might add that this dog was dipped in water before I brought it, to facilitate that, and through a process of careful carving, we could reproduce the markings on this dog exactly (illustrating). I guess that is enough to show.

Mr. Porter. I take it that it is not necessary for him to cut the dog entirely all over to demonstrate how the hairline incisions are made in a raw plaster model.

Q. You have now scraped three hairline incisions on the left-hand side of your plaster model, Plaintiff's Exhibit 11? A. Yes. Now, after the dog has been incised entirely over the surface, then any mould made from that dog from that point on would carry the incisions exactly as they appear on the model and would be reproduced in every other cast.

Q. Looking again at the Woolworth dog, Plaintiff's Exhibit 2, would you point out any parts that you consider blemishes, which might be removed by careful hand finishing, for instance? A. There are two obvious blemishes which protrude from the surface of the model.

Q. What are they? A. Well, I suspect that something—while they were being fired—as I say, the model is out of control and you can't touch it—I suspect that another piece in the kiln fell against that model and disturbed the glaze. And normally, in our field, we would not sell a dog like that; we would consider it a second, or third, or fourth, and discard it. This, however, I might add, was the best one that I could find in the collection of dogs that Woolworth was selling.

Q. When you bought that model? A. Yes, and those are imperfections which shouldn't appear on a good model.

Q. How about the line down the middle of the back? A. Well, that line is part of that mould seam. The mould seam can be removed, and is removed after each cast, but sometimes it causes the clay to be—wherever hand-work was done on that, it causes the clay to react a little differently to the glaze, and so the glaze shows up a little darker along those edges than it would along the smooth surface.

Q. Would you now again take your own plaster model, Exhibit 5, and your porcelain model, Exhibit 6; and point out any differences which there may be between those two models, and state what they are due to? A. Well, there would have to necessarily be slight alterations made, as I stated—

The Court. You are referring to what exhibit?

The Witness. There would have to be slight alterations made in Exhibit No. 5, the plaster model, in order to facilitate its production in a ceramic such as in No. 6. And so slight alterations were made in the plaster model No. 5, in order that the mould in which we in-

tended to produce the porcelain model, No. 6, could be made. But other than those slight alterations made in the plaster model, which are not too evident, the other variations would only be due to the dissimilarities in the product or two different types of material.

The Court. That is, one is larger than the other?

The Witness. One is larger than the other because of shrinkage involved in porcelain. The edges of the ceramic model may have been blunted a little more because of the heavy syrupy glaze which flows over it. These similarities in the porcelain model, No. 6, resemble more the Woolworth model, No. 2 than they do, for example; the plaster model.

Q. Now, you have told the Judge that you believe that the Woolworth dog, Plaintiff's Exhibit No. 2, was copied directly from your plaster model, Plaintiff's Exhibit No. 5.

Mr. Barnes. I suppose the form of the question is leading in the superlative degree.

The Court. It is kind of leading.

Mr. Porter. It is only that it was brought out two minutes ago, and I thought I could summarize the testimony.

Mr. Barnes. If his testimony is that in his opinion it is a copy, I don't object to that.

Mr. Porter. I believe we can all agree that the witness said that he based that opinion on the hair configuration.

Mr. Barnes. Now, I believe that the witness should give that testimony, your Honor, and not my brother, who is highly competent to do it.

Mr. Porter. Except that it came out two minutes ago, and I assumed you were listening.

Mr. Barnes. Then why ask it again, if that is what he answered two minutes ago.

Q. Did you state a few minutes ago that you believed the Woolworth dog was copied from your plaster model particularly because of the similarities in hair configurations? A. Yes.

Q. And you pointed those out to his Honor? A. Yes.

The Court. And you mean model 5?

The Witness. Yes, model 5.

Q. Have you at any time made or designed a cocker spaniel dog in show position? A. Yes, I have.

Q. And can you produce such a model? A. Yes, this is it (indicating).

The Court. What do you mean, in show position?

The Witness. Well, there are standard positions in which they place various breeds of dogs, in order for the judges to inspect them in the dog show.

The Court. I see.

Mr. Barnes. Do I understand you contend that this—is this going to be an exhibit?

Mr. Porter. Yes.

Mr. Barnes. Is that under your Jan Allen copyright? Do you contend that?

Mr. Porter. No. I will bring out from the witness that he has made a cocker spaniel dog anatomically correct; that was my purpose.

The Court. And is that the dog?

Mr. Porter. Yes, sir. This is a particular model brought in for a particular purpose, and I will ask Mr. Press to state what it is.

The Witness. This is an entirely separate original model of a cocker spaniel.

The Court. Nothing to do with the dog in suit?

The Witness. No.

The Court. One designed by you?

The Witness. Yes.

Q. And when did you make that design? A. I believe it was sometime last year, sometime in 1949.

Q. Can you place it better? A. It was in the last half of the year.

Q. And would you tell us whether that dog, in your opinion, is an authentic and realistic cocker spaniel, having the proper anatomical features of a prize winning cocker spaniel? A. Yes, I feel quite certain it is, not only because of my own opinion, but I had consulted with experts and worked from their comment until we all felt that it was a good example of a cocker spaniel in show position.

Q. And is that an original design of your own? A. Yes.

Mr. Porter. I will offer that in evidence.

Mr. Barnes. Is that of any materiality, a dog that he gets up?

Q. Well, would you point out, Mr. Press, whether in making a cocker spaniel dog of proper authenticity, you found it necessary to use and did use—the exact hair conformations shown in the Jan Allen model, Plaintiff's Exhibit 5? A. No, because I did not.

The Court. Now, so that we will have that properly identified for the record, let us have it marked for identification only.

[Model of cocker spaniel of the witness Press marked Plaintiff's Exhibit 12 for identification.]

Q. You might compare it with your plaster model, Exhibit 5, and point out the obvious differences? A. Well, in producing a new cocker spaniel, although we do have this one—

Mr. Barnes. May I object to this whole line? He is producing now something that he got up, that he says is entirely different, and his own idea.

The Court. How is that going to be relevant in this case?

Mr. Porter. It just takes the heart out of Mr. Barnes' case, because he says that when you make cocker spaniels, they have all got to be like the plaintiff's copy. They don't have to be. Every original artist is bound to make them different.

Mr. Barnes. Now, may it please your Honor, this witness has produced a self-serving thing which he wants to bring in, and I sort of smelled the argument that was coming from my brother on that, and I object to it. It isn't a proper exhibit at all. His whole idea is to take this indicating a true copy of a dog, without a copy of the article itself, and I object to it. It is not relevant.

Mr. Porter. Well, he has made it himself.

Mr. Barnes. I don't care.

The Court. Why do you say it is competent, Mr. Porter?

Mr. Porter. I am offering it, sir, to show that it is still possible to make a cocker spaniel dog which is anatomically correct and authentic and realistic, without copying the plaintiff's previous Jan Allen model, which is very plainly different, particularly in its hair configuration and arrangement. In other words, it is a different expression of two different artists, and by the same token, when you find the similarities copied in two models, you know one was copied from the other.

The Court. Your position is that this witness is prepared to testify that because of his personal knowledge, predicated on experience and study in connection with designs of cocker spaniels, that a person can design a cocker spaniel which truly would represent a show dog and which would in no way infringe upon a copyrighted dog, whether it is a Jan Allen dog or a John Jones dog, or something else?

Mr. Porter. Precisely, sir.

The Court. All right. This is a good time to take the recess, and I will make my decision at quarter past two.

[Luncheon recess]

Afternoon session

The Court. I think, Mr. Porter, in view of the fact that this evidence is anticipatory, I have to treat Mr. Barnes' opening as what he expects to show and of course he has a right to change his mind and until such time as there is evidence the other way, I think I will exclude it now and I give you the right to recall this witness if you feel it is necessary when it becomes relevant.

Mr. Porter. All right, sir.

Mr. Barnes. There is a witness here from the New York office, the buyer in the New York office, who would testify as to the 127 dozen that were bought at the 34 stores, and the price.

Mr. Porter. Is that Mr. Lindquist?

Mr. Barnes. Yes. He would, in addition, say that was a trial order which was never repeated because it was not a good selling item.

Mr. Porter. If you would like to put him on right now, that's all right.

The Court. Let's finish with the direct examination first.

Mr. Porter. I am practically through with Mr. Press right now. I will ask him no further questions about Plaintiff's Exhibit No. 12 for identification.

Mr. Barnes, I have here another model of a cocker spaniel in show position which we bought this noontime as Ludlam's dog store at Franklin Street. Does your same objection apply to this?

Mr. Barnes. Yes.

Mr. Porter. All right. I am through with Mr. Press.

The Court. Are you finished with your direct examination?

Mr. Porter. With Mr. Press, yes, sir.

The Court. Mr. Press, would you be kind enough to sit down for a minute? Mr. Barnes is going to call a witness out of turn.

HENRY H. LINDQUIST, Sworn.

Direct Examination by Mr. Barnes.

Q. Will you give your full name? A. Henry H. Lindquist.

Q. You live in New York? A. Yes.

Q. You are connected with the Woolworth company in the home office? A. Yes, in the executive office; the buyer.

Q. Are you the one who bought the 127 dozen dogs that are in dispute here? A. Yes, sir.

Q. And the price you paid was 60 cents a piece? A. Yes, sir.

Q. And they retail at \$1.19? A. Correct.

Q. And they were distributed to 34 stores? A. The original order was for one dozen to 34 different stores. That was 34 dozen. There were a few others and the total amounted to 127. They were delivered during March, April and May, 1949.

Q. Would you characterize that order? A. Very small order.

Q. Was there anything in the word "trial"? A. The first order was a trial order, yes, sir.

Q. And the Woolworth Company has something over 1900 stores in this country? A. Yes, sir, approximately.

Mr. Barnes. That's all.

The Court. Do I understand that since the sale of these dogs, so-called, since the last one was disposed of, the Woolworth Company purchased no more?

The Witness. That is correct.

The Court. And they are absolutely and entirely out of the business of selling the dog which comes within the purview of these proceedings?

The Witness. It is quite possible some of those original ones might be around in the stores. We have not purchased any since.

The Court. So far as you know they are all disposed of?

The Witness: So far as I know, yes, sir.

Mr. Porter. Mr. Barnes, you have shown me the order blank signed by Mr. Lindquist for that initial order. I think it might help us, your Honor, if that might be offered in evidence. It is around. You have it, Mr. Smerdon. It will speak for itself.

Mr. Barnes. We will produce that, your Honor. I think we can find it but I don't find it for a minute.

Cross Examination by Mr. Porter.

XQ. Do you remember the transaction, Mr. Lindquist, when you ordered these cocker spaniel dogs and who was the salesman you dealt with? A. I bought these at the factory. I dealt with Mr. Sabin.

XQ. What kind of model did he show you? A. The finished dogs. There were several of them.

XQ. Are they, in all essential respects, like the dogs, Plaintiff's Exhibit 2 and Defendant's Exhibit A here? A. Yes.

XQ. Does Sabin Manufacturing Company make those dogs? A. I don't know. I presume they did.

Mr. Barnes. [Handing paper to Mr. Porter] Here, we found that.

XQ. Mr. Barnes has just produced something that purports to be an order. [Handing] Is that the initial order? A. Yes, sir, there are several other dogs on the order and this dog appears on it as well.

XQ. And it is referred to there as "301 cocker dog ornament"? A. That is correct.

Mr. Porter. If I may, I would like to offer this in evidence as a plaintiff's exhibit.

[Purchase order marked Plaintiff's Exhibit No. 13.]

Mr. Porter. I think that is all, Mr. Lindquist.

The Court. Will counsel come up?

[Conference at the bench]

Mr. Fox. May I explain that? Is it permissible? Your Honor—

The Court. Certainly.

Mr. Fox. This was an attempt to dispose of 4,000 puppies they ruined for us. We are stuck with them and have been for three years because they infringed on our copyright.

Mr. Greenawalt. That, your Honor—we had nothing to do with that case.

The Court. That isn't before me.

Mr. Fox. They brought this matter up.

Mr. Greenawalt. Not only that, the Woolworth Company did not have defense of that case. They settled for nuisance value.

Mr. Porter. The infringement was so clear they could not deny it.

Mr. Fox. They admitted it in our office.

The Court. I have before me the four corners of a bill of complaint together with an answer and some evidence up to the present time in the way of exhibits and testimony of witnesses and

nothing else so you don't seem to be very far apart. I was wondering if there was some way you could go outside for a few minutes.

Mr. Porter. The Woolworth Company is in the innocent position of a bystander. It appears, from what Mr. Lindquist says, he doesn't know there was a copyright on the dog.

The Court. There are so many articles for sale in their stores they have no opportunity of telling whether or not there is a patent or copyright infringed.

Mr. Porter. I would like to make it clear this is not an unusual situation.

The Court. They say "we have abandoned this" and they go to the Sabin Company and they say "We bought it. We will have nothing more to do with it."

Mr. Porter. If they make an undertaking to that effect, that will be different. That will change the complexion.

Mr. Fox. But this is so late. What good will it do to stop them now? They have ruined our sale.

The Court. You have a right to a free and untrammelled trial before me.

[Conference at the bench.]

[Afternoon recess.]

[Adjourned at 4:00 P. M. to 10:00 A. M., April 27, 1950.]

Second Day

Court Room No. 5, Federal Building,
Boston, Massachusetts.

Thursday, April 27, 1950. 10:00 A. M.

The Court. The only issues here, as far as I can observe, and I did a lot of work on this case last night—I have really a question of fact, isn't that right? I have a question of fact, really, because the law is clear.

Mr. Porter. Yes, sir, I think you are fundamentally correct.

The Court. And the damages are fixed, as I said yesterday, I didn't want your client to get the idea we could try whatever may have happened in connection with other copyrights, which I will exclude all along the line.

Mr. Porter. Your Honor, I may say that following the recess, I waited in vain for any call from Mr. Barnes, so we will go along this morning.

The Court. We will have no further talk of adjustments, then. Let's go along.

FRED PRESS, Resumed.

Cross Examination by Mr. Barnes.

XQ. Mr. Press, I think you said something yesterday in your opinion to the effect that there might be half a dozen artists or sculptors put in a room with a model of a dog such as the cocker spaniel that is in question in this case and that they would make their own models from the subject and that you would get six different conceptions from each artist from that model; wasn't that your testimony? A. Yes, sir.

XQ. And of course as an expert on this subject you will agree that each one of those separate conceptions of

the same subject would be susceptible of copyrights, wouldn't they; there is no question about that? Each one could get a copyright of his own original work on that particular model? A. Yes, I feel that he could.

XQ. And even if there were 25 artists or sculptors doing that work and it was made from the same model, there might be that many copyrights of the originality displayed in making designs from the same subject? A. You mean from the same live model?

XQ. Yes. A. Yes.

XQ. Now, this particular subject, a cocker spaniel, is a dog that is customarily shown in practically all the dog shows in the country; isn't that true? A. All the dog shows that show the different breeds, yes, sir.

XQ. Well, the cocker spaniel breed is in such demand in dog shows that you find the showing of these dogs in practically every dog show? A. Every show that shows the variations of dog breeds, yes.

XQ. Don't they have, in this cocker spaniel, a contest for the finest bred cocker spaniel and give prizes to the winners in these dog shows? A. Yes.

XQ. And isn't it customary in the dog shows that these dogs are in what they call "show position" for the judges? A. Yes.

XQ. And that show position is the position that is taken for the copyright of Jan Allen and also the one for the defendant in this case that was produced here; it was a cocker spaniel in show position, wasn't it? A. Yes.

XQ. And that is an extremely common position for these dogs to take in the show and these shows have been going on for many years in this country, haven't they, to your personal knowledge? A. Yes, sir.

XQ. Are you interested in raising dogs yourself? A. Not in raising, no.

XQ. Your work is mostly in this modeling business? A. Yes.

XQ. They have these magazines, don't they, on the Dog World; have you ever seen any of those? A. Yes.

The Court. I didn't get that question.

Mr. Barnes. They have dog magazines which have pictures of these dogs in position.

XQ. Now, there is one on page 51 of this dog magazine. I call your attention to a picture of a cocker spaniel. Is that in position? A. Yes.

XQ. And that is from the Pentown Kennels? A. It would appear so.

XQ. It would appear so in that ad that that is a cocker spaniel in show position in this dog magazine? A. Yes.

XQ. And that is substantially the position that the show dog takes in the plaster model of Jan Allen's, isn't it? A. Yes.

XQ. And you could point out very easily the various points of similarity between that dog in this magazine ad and the Jan Allen dog, couldn't you? A. General points.

XQ. The tail, the head, the hair marking underneath here [indicating]— A. No, sir.

XQ. The ears pretty close, aren't they? A. That picture is not sufficiently in detail to allow a proper criticism.

XQ. There is a lot more here. A. None of those pictures would be sufficient.

XQ. There is one there [indicating] in show position on this— A. That is not a good position.

XQ. This book is full of those items, Mr. Press. [Indicating] There is another one there, in the G. E. Conkey Company. There is another cocker spaniel in position with the general outlines the same. A. The general outlines in this particular one are obviously different from ours although as a rule it is difficult to tell from a photograph, particularly a reproduced photograph in half tone in a magazine or any other sort.

Mr. Barnes. May I offer this magazine in the same way that the catalog was offered and call your Honor's attention to a variety of pictures that run all through it and offer it merely in re-

spect to the cocker spaniel pictures and nothing else?

Mr. Porter. No objection, your Honor. I would like to have it appear what the date of that magazine is and what the magazine is.

Mr. Barnes. It must be in here somewhere.

The Court. In the light of the answers of the witness, I would be inclined to exclude it, if there was an objection.

Mr. Porter. I will admit the immateriality, your Honor.

The Court. You don't object to its admissibility?

Mr. Porter. It does no harm in the slightest. It is just pictures of cockers in show position.

Mr. Barnes. I think that is for your Honor to say and my brother is assuming considerable of the judicial function here in that statement.

XQ. [Handing] Here is one for 1950 with a number of these cocker spaniels in show position, which is the general outline anatomically of the dog in question; isn't that true? A. As you say, they are general. I can't give you a specific answer. The outline is only general.

XQ. Before this—

Mr. Barnes. Would your Honor care to look at one at all?

The Court. No.

Mr. Barnes. These pictures are all through these magazines of the cocker spaniel dog in position.

The Court. Do I understand, Mr. Witness, as a result of your examination of these—I think you said they are photographs?

The Witness. They are reproductions.

The Court. And it is impossible for anyone to tell from looking at those whether or not they infringe upon the—

The Witness. Yes, sir.

Mr. Porter. There is no charge that they infringe on any copyright, your Honor. It is just a picture of a dog.

The Court. I mean in the sense you could tell whether or not it was comparable to the designs. That is what I mean.

Mr. Porter. I am perfectly willing to admit, your Honor, that cocker dogs in the show ring assume a so-called show position and that very commonly dogs are photographed in the newspapers and dog magazines in show position.

The Court. Do you want these marked?

Mr. Barnes. If your Honor will look them over—

The Court. Which one?

Mr. Barnes. No. 51 on this one here [handing] which gave a general idea of the general use of this show position of the cocker spaniel dog.

The Court. Counsel agreeing that this may be offered as an exhibit, page 51 of the October, 1947, issue of the Dog World, the cocker spaniel dog shown in the ad of Pentown Kennels.

[October 1947 issue of Dog World marked Defendant's Exhibit C.]

The Court. By agreement of counsel, this may be marked as an exhibit, to be identified by the record as the April 15 issue of the Dog World and the designs on that page, Page 49, of cocker spaniels in show positions.

Mr. Barnes. That is sufficient, your Honor.

[April 15 issue of Dog World marked Defendant's Exhibit D.]

XQ. Going back for a minute to the situation where six sculptors are making a model from a cocker in show position, you would not expect as an expert to find every one exactly alike, would you? A. No.

XQ. And you would expect that certain characteristics of the model would be accentuated in some of the sculp-

tors' models and not in others, wouldn't you, certain features of the dog? You could distinguish between the different models that are made from this original for each one, couldn't you? A. There is a fine point here that I would like to make.

XQ. Just a minute, please. Just answer my question. There would be a difference in each one, wouldn't there? A. Yes.

XQ. But there would be a good many of the characteristics in each one that would be in common; isn't that true? A. Yes.

XQ. The general anatomical structure of the dog would be fairly in common, wouldn't it? A. Yes.

XQ. The structure of the head, the anatomical shape of the head would be fairly common in all, wouldn't it? A. Yes.

XQ. And the tail? A. Yes.

XQ. And the hair on the dog? A. No, sir.

XQ. There might be some difference there, you think? A. Yes, sir.

XQ. And then you think that all six of these different things would be distinguishable in some way; isn't that true? A. Yes, sir.

XQ. And yet in a general way they would all have the outline anatomically of this particular subject that the artists were working on; isn't that true? A. Generally, yes.

XQ. Have you ever been in Zanesville, Ohio? A. No, sir.

XQ. Did you know that Zanesville, Ohio, was known as the "Clay City"? A. I remember that from your mention of it yesterday.

XQ. You hadn't heard of it before that time? A. Not previously, no.

XQ. Are you familiar with the fact that Ohio was a great state for pottery and clay works? A. I have heard of it.

XQ. And has been for many many years; is that so, to your personal knowledge? A. I don't know.

XQ. Don't you know that it has some reputation for works in clay; do you know that? A. I heard vaguely. I wouldn't be sure.

XQ. Did you ever hear of the Burley Pottery Company of Zanesville? A. No.

XQ. Did you ever hear of the LaPere Pottery of Zanesville before this case came up? A. No.

XQ. Or the Sabin Manufacturing Company? A. Not previous to this case, no.

XQ. Would it surprise you if nobody connected with these companies had ever heard of the Contemporary Arts Company before this case came up? A. No.

XQ. Or that they had ever heard of Jan Allen, either? A. No.

XQ. You know as a matter of fact, as an expert, that this particular dog has been the subject of paintings for years, don't you? A. Yes.

Mr. Porter. Of what, please, "patents"?

Mr. Barnes. "Paintings."

Mr. Porter. Excuse me.

XQ. And models of all kinds? A. Yes.

XQ. It is a very common thing, isn't it? A. It is a very popular dog, yes.

XQ. Let me ask you as an expert wouldn't it be about as easy for an artist or sculptor to pick a dog, a cocker spaniel dog, which was a prize winner which had been in shows which had taken a prize and make a model from life; wouldn't it be just about as easy as it would to make a copy which somebody else had copyrighted? A. No, sir.

XQ. Because it would require a little more work, would it? A. It would require a good deal more knowledge.

XQ. More knowledge? A. Yes, sir.

XQ. If a man was brought up in the modeling business and came from the Clay City and had the original, life, prize-winning dog that came out of a show, you would assume he could come out with a model of his own which

would betray some of the characteristics that go through all these dogs, wouldn't you? A. No, sir. He might study sculpture all his life and be a rotten sculptor.

XQ. He might be a good one, too. That is a subject matter for individuals, isn't it? A. That's right, sir.

XQ. There are good and bad in all fields, aren't there? A. Yes, sir.

XQ. Now, the company you are interested in, you would call the business "commercial art", would you? A. Yes.

XQ. And your position in the company is that of superintendent? A. Chief designer.

XQ. Chief designer, and you have some 125 copyrights on dogs in various positions? A. I am not exactly familiar with the exact number. We have well over 100, I would say.

XQ. And some of these are yours? A. Yes.

XQ. Your copyright work? A. Yes.

XQ. And some are Jan Allen's? A. Yes.

XQ. And you have been with the company for eleven years? A. Yes.

XQ. Continuously? A. Yes.

XQ. Wasn't there three years you were in the service? A. Yes, but I was still connected with the company.

XQ. You were still around here? A. No, I wasn't around; I was in contact through the mail.

XQ. You contacted them through the mail for the three years you were out? A. Yes, sir.

XQ. How many of these copyrights are yours the company has? A. There are five at present.

XQ. You have under you men who do the various types of work that you have described in the process of making these dogs, do you? A. Yes.

XQ. How many men are employed there in your company doing that work? A. We have eight people, two of them are girls.

XQ. Two of the eight are girls? A. Yes.

XQ. And is that substantially the same force that has been there since you have been connected with the com-

pany? A. Several of them are. There have been changes in the paint department and so forth.

XQ. And at no time in the period you have been with them has there been any substantially greater number of employees than at the present time; is that right? A. It has fluctuated between the present force and at times to 12 or 15.

XQ. Now, this item, as like all other items in the commercial art world, it goes—an item is liable to go stale after a while, isn't it? A. Yes, very likely.

XQ. It has its run and then goes out? A. Yes, it might.

XQ. Isn't it a fact that this particular dog you have had been copyrighted for seven years and had been on the decline? A. It had not, no, not before this case.

XQ. I think as an expert you will agree with me that when these artists or sculptors have a subject like this dog for making up a model, that the object of the thing is to make a true copy of the dog; isn't that so? A. Yes.

XQ. I think that was your testimony on direct examination, wasn't it? A. Yes.

XQ. So that they are all there exercising their skill and ability to make a true copy of that subject; isn't that so? A. Yes.

The Court. Mr. Witness, is it your position, and I don't ask this question for any other purpose except getting some enlightenment for myself—is it your position if, say six sculptors take a model of a cocker spaniel in show position, that an artist like Jan Allen, for example, could distinguish her design, the result of her handiwork, from the other five?

The Witness. Yes, definitely.

The Court. That is, a sculptor that puts together a cocker spaniel—I mean taking as a model a model of a cocker spaniel in show position such as we have—could copyright that design and differentiate it from any other, no matter how many there were?

The Witness. Yes, sir.

The Court. All right.

Mr. Barnes. I think I am through. I would like to just take a moment. [Pause]

XQ. In the sale of the article that you had, was there a marking or tag attached that that was the cocker spaniel in show position? A. No.

XQ. There was no such card or anything that went with the sale; it was simply the article itself? A. Yes.

Mr. Barnes. That's all.

Redirect Examination by Mr. Porter.

RDQ. Mr. Barnes asked you about the photographs of cocker spaniels in show positions as shown in two dog magazines which he produced. Are photographs like that sufficient for you, as a sculptor, to make an accurate model of a cocker spaniel in show position? A. No.

RDQ. And why not? A. Because the various fine points of the dog, the basic structure of the dog, are not obvious. Not only is it due to the fact that the printing process has not been perfected to the extent of printing exact reproductions but also the heavy feathering on the dog makes the underneath structure so hard to see and so difficult to visualize that as a sculptor who cares to do a thorough job, I would feel I didn't have sufficient information to base my model on.

RDQ. I know you touched on this yesterday but I would like to ask you again in this connection to state how you go about making a dog sculpture, what research and study you do before you make your model?

Mr. Barnes. May it please your Honor, I am perfectly willing to spend—

The Court. We would like to have that question answered, Mr. Barnes, I would myself. He answered a little bit on direct examination yesterday but I think if you will examine the transcript you

will find it isn't thorough and in the light of the questions on cross-examination I wonder if it might be used as—what Miss Allen, for example, used as a milestone before she prepared this model.

Mr. Barnes. She is here this morning, your Honor.

The Court. I think he is qualified. The weight of it is for me, of course. As a sculptor he says he has supervised this work and I think he says he has five original models already copyrighted in the Copyright Office in Washington and I think I will allow the question. I don't want to be too strict, Mr. Barnes.

Mr. Barnes. I had no objections—

The Court. I won't allow any wandering around. I know you have witnesses here from Pittsburgh and I am very anxious to go along. I will allow the answer. Do you remember the question?

The Witness. Yes, sir.

A. In constructing an original design, the result will depend to a great extent upon how much you knew about the anatomical structure and how much research you did to make certain that it was accurate and so the first job would be to do a thorough research and find out what the skeleton or the bone structure of the dog is upon which would depend the overlay of the muscular development and both of those are perhaps the most important.

RDQ. What sources do you turn to for that information?

A. Well, generally we try to get all the information we possibly can from the American Kennel Club who is the foremost accepted authority on dogs in the country. We get whatever we can from them and they have been very cooperative, and from there on it is a question of delving into the library and discovering the anatomical research there, after which we bring in the dog itself or we go to the kennel and we can then apply the identifying qualities which are generally superficial on individual dogs.

RDQ. And then following that, your plaster model, do you further consult with experts? A. After we have the clay or, rather, the plasticine, model to a reasonable stage where an expert who is perhaps an expert on dogs but not an expert sculptor can be called in, we call in such an expert and ask that they consult with us and criticize the dog purely from the standpoint of the accuracy of the dog and we take whatever they have to mention into consideration and make our changes on that soft, plasticine model. That may occur two or three or four times, as many times as are necessary until we are all in accord that the dog is a perfect model.

Mr. Porter. This is a point, your Honor, Mr. Barnes has brought out on cross-examination which makes this dog become pertinent and I wanted to bring out the very point of the difference of the personal factor of the artist and sculptor in his own interpretation of the model and even though half a dozen artists work from the same model, their interpretation is different because their artistic expression is different.

Mr. Barnes. Just a minute—

Mr. Porter. Mr. Barnes has made this pertinent by his own examination.

Mr. Barnes. I don't see that I examined on that model that he made in preparation for this case, your Honor, and that is on that evidence, that he made that up for this case.

Mr. Porter. Not at all, sir. You can cross-examine as much as you want but it was not made up for this case. It is another cocker spaniel in show position designed by Mr. Press last summer and which is quite different, as you will notice, in its individual expression and in the personal factor of design from the Jan Allen model, although they are both show dogs.

The Court. I don't want to get into a field of speculation where I am going to have a lot of dogs, cocker spaniels that are copyrighted and then have a determination of the question as to whether or not there is an infringement on the part of any of them. I think the testimony of this witness is clear—I may be wrong—but as I understand, summarizing part of his testimony, what he says is this, and if you disagree, Mr. Barnes, don't hesitate to correct me—that regardless of the number of sculptural designs of these cocker spaniels, and those are the only dogs I am concerned with, that there are distinctive markings which are associated with the particular capacity of each sculptor so that, using them as a yardstick, his testimony, reduced to plain English, is this: that the dog, this cocker spaniel dog that was sold by the Sabin Company to the Woolworth Company and which was disposed of in various stores under the agreed statement of fact yesterday is a copy, is an infringement, we will use that word.

Mr. Porter. Is a direct copy.

The Court. His position, the witness, is that it is a copy of the one that was sculptured by Miss Allen and which was registered in the Copyright Office in Washington in 1942.

Mr. Porter. That is correct, sir, and I think there is a fundamental misconception on Mr. Barnes' part.

Mr. Barnes. Just a minute—

The Court. Why should this testimony, what he may have done with reference to a cocker spaniel dog which isn't part of these proceedings, how can it be of help to the Court?

Mr. Porter. Merely illustration of the point Mr. Barnes brought out in cross-examination, that there are differences in individual expressions.

The Court. Your witness says that's so; is that right?

The Witness. Yes, sir.

Mr. Porter. And this is an illustration of it and that is why we want to put it in, as an illustration of the difference of individual expressions on the part of different artists and I have here one other dog made by a competitor of the plaintiff company which again is entirely different. I think these are the fundamentals of this case, your Honor, to show that difference, that you don't have to copy and you can still make a cocker spaniel in show position and you don't have to copy the plaintiff's original model.

The Court. If you think it has that probative value, I will admit it.

Mr. Barnes. Will your Honor save my rights?

The Court. Surely, and if I find it hasn't I will exclude it. I have grave doubts about it, about its relevancy, myself, but for the time being I will admit it.

Mr. Barnes. Save my rights on that?

[Plaintiff's Exhibit No. 12 for Identification marked Plaintiff's Exhibit No. 12.]

RDQ. State what this model is which is marked Plaintiff's Exhibit 12 for Identification? A. It is a cocker spaniel in show position—

Mr. Barnes. May I say this much before the examination, that it opens up a new field which really isn't anything that the witness hasn't said to me. I don't see the purpose, or anything else.

Mr. Porter. You are the fellow that brought it out.

Mr. Barnes. Don't blame anything on to me. I have my work to do.

The Court. I am not deciding solely on that basis. What particular line of questioning or what form of question did Mr. Barnes ask which would indicate that he opened up this field?

Mr. Porter. This question, your Honor, when he asked if six different sculptors were in a room making a model of a cocker spaniel in show position, would it not be true that each sculptor's own interpretation of that model would be different.

The Court. I think he said each would not be the same. I think those are the very words that the witness used, if I remember it. I listened to that very carefully. Now, that is your position, isn't it?

Mr. Porter. Yes, sir and these models merely illustrate that point.

The Court. If it is not in dispute—

Mr. Porter. I don't see why he should object to our putting in the illustration, then.

The Court. If it isn't in dispute, both of you agree and you won't need to prove it by anything else. Each is not the same, he says it isn't, and your experts—

Mr. Porter. I would like to ask Mr. Barnes if he is willing to admit this is not the same.

Mr. Barnes. I am not interested in it.

Mr. Porter. And you see he is not agreeing, your Honor.

Mr. Barnes. I want to get home before this month is out and why open up a lot of things that are not of consequence?

The Court. I think in view of the fact that it is agreed that there is no disagreement over the fact that the peculiar characteristics of a sculptor are somewhat—I suppose they are somewhat like the peculiar characteristics of a person that writes a letter. They have unconscious tendencies—everyone is in agreement that the work of one sculptor can be distinguished from the work of another.

Mr. Porter. Even though they work from the same model.

The Court. In view of the fact that there is no disagreement, I will exclude that testimony now because I want to get along. Mr. Barnes doesn't dispute that.

Mr. Porter. When I asked him, he says he does dispute it.

Mr. Barnes. I didn't want to be understood to say that. I will say this—

The Court. In view of the fact that this witness has testified that if six sculptors make a study of a cocker spaniel and do the things upon which sculptural work would be predicated and then get a cocker spaniel set up in whatever form it is, plastic form or some other kind of form, we could tell the difference. I don't know what those experts are going to say but that is—

Mr. Barnes. Can I say this, in view of your Honor's explanation, that my position is from this witness that in making a true copy of a subject like this one in question, if they were all exactly true copies, they would all be exactly alike. They would have to be. With six different people there would be some differences and that I am perfectly willing to admit, like two and a half billion people in the world, there are no two people exactly alike.

The Court. It is for the Court to find whether or not this cocker spaniel dog that was sold at \$1—some odd, whatever the exact price—is an infringement of the dog that was copyrighted and modeled—sold by your client.

Mr. Barnes. That is so.

Mr. Porter. But your Honor will see why this is the very crux of this case. Here is another artist making a cocker spaniel in show position which is quite different from the copyright.

The Court. There is no dispute over that.

Mr. Porter. May I have it clearly understood about this one, Mr. Barnes [indicating], which is

a cocker spaniel in show position which we bought yesterday at Ludlam's Pet Shop on Franklin Street, and it is marked "Royal Design, The Mortens Studio." Do you want to look at that and agree it is quite different from the Jan Allen model?

Mr. Barnes. I don't want anything to do with it at all.

Mr. Porter. That is the whole trouble. He objects and yet he quibbles.

Mr. Barnes. It is perfectly clear the way the Court has stated it. Why pursue that subject any further?

Mr. Porter. This is the very crux of the case.

The Court. Do you agree that those two are—

Mr. Porter. Different from the Jan Allen model.

The Court. No, I don't mean that. Can you agree these two, this one here [indicating] that was offered for identification and this one are models of a cocker spaniel dog?

Mr. Porter. In show position.

The Court. In show position.

Mr. Barnes. I haven't any doubt of it. I still object.

The Court. I will admit those and I don't think there is anything beyond that necessary. You don't object to that, do you?

Mr. Barnes. Well, only on this ground, that we could bring in here a thousand of them and—

The Court. All it is going to prove, Mr. Barnes, is what you admit, that they are different.

Mr. Barnes. Okay.

The Court. I suppose Mr. Porter feels he needs these to argue that if this design sold by your client, it must be a design, Mr. Barnes, that was copied—that is for me to find out.

[Sample of cocker spaniel statuette from Ludlam's Pet Store with designation "Royal Design,

The Mortens Studio" marked Plaintiff's Exhibit No. 14.]

Mr. Barnes. I want to save my rights on the admission of that because it might open the door to bringing in a thousand of them.

Mr. Porter. He doesn't have to worry. There aren't going to be any more.

Mr. Barnes. He can bring in plenty.

The Court. I will give you the same chance.

Mr. Porter. You have already put in your dog book to prove the same point.

The Court. Mr. Witness, do you say those are models of cocker, spaniel dogs, in the light of your experience as a sculptor?

The Witness. Yes.

The Court. All right. That is all you want to show, isn't it?

Mr. Porter. Yes, sir, ~~that's~~ all.

ELIZABETH PHILBRICK HALL, Sworn.

Direct Examination by Mr. Porter.

Q. Will you please state your name? A. Elizabeth Philbrick Hall.

Q. And where do you live? A. 164 Route 128, Dedham.

Q. And your husband's name? A. Glenn G. Hall.

Q. And what is your occupation? A. Well, essentially a sculptress—animal sculptress.

Q. And— A. I could add, housewife and dog handler.

Q. Do you raise dogs of your own? A. Yes.

Q. What breeds? A. Essentially Keery Blue terriers but we raise cockers and poodles, Griffons, and I could go on for quite a while.

Q. And you do your sculpturing under a pen name? A. Yes, Jan Allen. That is for Contemporary Arts only, under that name.

Q. And at some time did you design for Contemporary Arts a cocker spaniel dog in show position? A. Yes.

Q. Do you see a dog in front of you here which embodies your design? A. Yes, I would—

Q. Refer by exhibit number and so forth. A. [Indicating] These are the plaster originals. I would say that every one of them was essentially the same dog, the same model.

Q. And you are referring to exhibits 5, 6, 7, 11 and Plaintiff's Exhibit No. 2 which are in front of you? A. [Examining] Yes.

Mr. Porter. Mr. Barnes, I take it that—do you want me to identify the copyright registration?

Mr. Barnes. It is an exhibit.

The Court. That has been offered.

Q. You say you designed these models such as the plaster model, Exhibit 5, and then— A. [Indicating] This is the design for production.

Q. What do you call this material? A. Ceramics.

Q. And porcelains. Those are porcelain, Exhibits 6 and 7? A. Yes.

Q. Would you please state your procedure in designing that cocker spaniel dog in show position, what research you did or whatever you did? A. To make it very clear, that particular model was not done from any photograph or any particular dog. It was done with research on a lot of photographs, a lot of dogs, my knowledge of a cocker spaniel, the information from several judges, and it was a dog—the cocker spaniel is a dog that has gone through great change in the past ten years or more.

Q. When did you make this design? A. I believe around 1942 or 1943. It was one of the first.

Q. Would the date of the copyright help you in that respect [handing]? A. That would be more correct—I wouldn't know the exact date but that would be about right. But I used my own knowledge plus the standard

of the cocker spaniel. The cocker, as I say, is different today and was different five years prior to that, particularly in the length of the back and shortness of legs. The dog has changed considerably but for that particular time I tried to take what the judges liked and what the breeders liked and what I myself liked. It is a composite, ideal dog.

Q. Of the cocker spaniel? A. Yes.

Q. Do you remember how long it took you to make that research before you made that model? A. Probably over a period of a month. It might be more, and might be less.

Q. Mrs. Hall, you have also designed other dogs for Contemporary Arts? A. Yes.

Q. Do you follow the same procedure there? A. Sometimes I have gone much more from a particular dog but I always try to incorporate—every dog has a fault, maybe more, maybe less, but I try to correct that fault in a model. If I am working from a dog that is as close as I can come, I try to correct that fault and make it a little bit more ideal or exaggerate a point that—

Q. And what is your purpose in trying to make it an ideal dog? A. Well, that is what the dog breeders and show people are after. They have an ideal in mind. That ideal which is from current dogs that are winning. You set five dogs up and most people couldn't tell from the side lines but the judge finds different things.

Q. And do you have a royalty arrangement with Contemporary Arts? A. Yes.

Q. And have you collected royalties on that cocker spaniel dog over the last seven years? A. Yes.

Q. Mrs. Hall, would you tell us briefly what your training has been in sculpture? A. Well, always my father and mother were both artists and I was brought up always modeling or drawing, and always animals. I went to the Massachusetts School of Art for four years and then continued there teaching and helping and working probably a period altogether, both my schooling and being at the school, six or more years.

Q. Where is the Massachusetts School of Art? A. At the corner of Huntington and Longwood Avenues.

Q. In Brookline? A. Yes.

Q. And how many various dog types or models have you designed in your career? A. You mean in commercial work.

Q. Yes. A. Or the field of fine arts?

Q. Well, both perhaps. A. I don't know as I could give you a number. I used to turn them out, sometimes one a day, but I have a great many in commercial production, not only dogs but animals, too, commercial and advertising work, and I have one dog in particular that was accepted and is in exhibit at Brookgreen Gardens in North Carolina.

Q. Did you win a prize on that dog? A. No, that was bought by Anna Hyde Huntington for her museum. It is in bronze.

Q. What kind of a dog? A. That is an English setter.

Q. Do you remember the selling price? A. She gave me \$300, not as a selling price. She didn't buy it from me. She bought the piece.

Q. Have you ever won any prizes as a sculptress in animal sculpture? A. The first one I won, the first year in art school, I won second prize for the National Soap Sculpture competition. That was a mouse. I won the Gaines War Dog Memorial Trophy.

Q. Will you tell us what that was? A. Gaines put out a competition nation-wide, for the idea or model of a statue to commemorate the work that the war dogs had done.

Q. In World War II? A. Yes.

Q. Do you have a picture of that statue? A. I haven't it with me.

Q. [Handing] This? A. Yes, that is the model.

Q. Have you received publicity in the newspapers regarding some of your sculpture? A. Well, that and my drawings, too.

Q. [Hanging] What is this piece of—this clipping? A. From the Globe, I think.

Q. Do you remember approximately when? A. Yes—about—it was the summer—four years ago last October, the summer prior to that.

Mr. Porter. If your Honor please, I would like to offer in evidence this clipping about Mrs. Elizabeth Philbrick Hall which shows the Gaines War Dog Memorial Sculpture which won her a \$500 prize.

Mr. Barnes. I think she has testified to that, your Honor. I don't see that the newspaper clipping would help any. I would object to it.

The Court. I will exclude it.

Q. What artists—what sculptors have you studied under? A. Cyrus Dallin and Mr. Raymond Porter.

Q. Has Mr. Cyrus Dallin ever given you any testimonials as to your ability? A. Yes.

Q. [Hanging] Do you want to read that to the Court? A. This was given to me at a time when I was entering for a competition.

Mr. Barnes. Well, I don't—I object to this.

The Court. I suppose you are asking these questions for the purpose of qualifying her as a—

Mr. Porter. As an expert.

The Court. Do you question her qualifications?

Mr. Barnes. No, I don't, your Honor.

Mr. Porter. Yesterday he didn't know anything about her, your Honor.

Mr. Barnes. Just a minute, I don't think—

The Court. I don't think you should say that. I assume she is in relatively the same position as a medical expert would be. Counsel wants to know what a person's qualifications are and, as a matter of fact, Mr. Barnes is satisfied that she is an expert; is that right?

Mr. Barnes. Yes, your Honor.

The Court. There will be no need of any further—

Mr. Porter. Qualifications as an expert?

The Court. That's right.

Mr. Porter. Thank you, sir.

[Handing to Mr. Barnes] You might like to read about Mrs. Hall, sometime, Mr. Barnes.

Mr. Barnes. I would like to meet her.

Q. Did you say how many dog designs you had done for Contemporary Arts? A. I wouldn't know the exact number.

Q. Approximately? A. All the popular dogs and a great many of the lesser known dogs.

Q. Mrs. Hall, there has been identified in court previously a model of a dog which is marked Plaintiff's Exhibit 2 and which we have called the "Woolworth dog." I will ask you to look at that dog carefully and compare it with your plaster model, Exhibit 5, and tell us what you think of the origin of that so-called Woolworth dog?

A. Well, I looked at it before. I include it in the group. In my opinion, and I am very strong in it, that that isn't even a copy; it is done on top of the original model.

Q. One of your original models which were commercially sold by Contemporary Arts? A. How, when or where I don't know but there are certain features of the way it is modeled.

Q. Will you point those out to the Judge? A. This is all superficial, just as if I had made a model, gone out of the room, come back in and I would know somebody had been fooling with it.

Q. If you are pointing out part of it for the record, the stenographer would like to know what part? A. The texture of the hair.

The Court. This is the model—the defendant, Woolworth!

Mr. Porter. Yes, sir.

A. [Continuing] In every form--now I speak of a form and I mean the whole form of the tail, the form in which the hair lays, maybe the direction of the form of the bone. All those forms are there. You could take a pointing machine, which is a machine the sculptors use when they have a clay model, and have a brick of granite and take the machine and the point goes in this distance in on their model and it goes smaller, reduces it down, but you could take that machine and almost prove it right on here. Every point, every form is there. This hair form is superficial.

Q. You mean hairlines? A. Yes, the hairlines but you will even find the original form of those hairlines on there. Nobody does hair the same. I couldn't do it myself the same. If you asked me to sit down and copy it, I couldn't in the formation as closely.

Q. As is reproduced in that Woolworth model? A. Yes. To me this is more a case of ethics, artistic ethics. I wouldn't want to go out—I would rather do it myself.

Q. Do you want to look at the Woolworth dog carefully and possibly compare it underneath and then again from the rear— A. I don't need to—

Q. —and find points of similarity.

The Court. You have examined the Woolworth model and your model; is that right?

The Witness. That's right. There are things, now, the filling-in here and here [indicating] that is necessary to make a ceramic model. You could not make an undercut. If this dog here were cast just as it is, these ears would break because it is cut underneath there. Therefore, on the model, before it is made, little undercuts have to be all filled in. That is simply something to keep it from catching. You can see yourself the undercut there, but all the large forms are the same. The face has been marked up a bit but it is all essentially the same model.

Direct

As I say, I do not believe anyone could sit down and copy this model as closely as this. The superficial marks are—they are just hair. The dog could be untrimmed and trimmed here, that's all.

Q. Do I understand from your testimony it must have been made from an actual plaster model of your dog?

A. That is my opinion. If you could sandpaper that stuff and brought it down say, oh, less than one-sixteenth of an inch, you would have an almost identical dog.

The Court. Did you try to do that?

The Witness. No, but the form, the way—I wouldn't do it the same today as I did then. I wouldn't—I couldn't. The actual flow of the lines, the form, I mean, you don't miss your work much, how you make certain things.

Q. Do I understand you correctly to say that the differences which appear in the—the slight differences which appear in the Woolworth model are due to the different type of casting and ceramics rather than— A. There are those differences here. [Indicating.]

Q. Pointing to the head? A. The others are obviously superficial differences of the marking of hair plus very few what I would call "messing up" the face.

The Court. Have you got a model comparable to that?

The Witness. The ceramic here. You will probably find the same here. That is taken off just as this one here. This one is done to a greater degree. It isn't necessary to go as far as that, but you see you can put your finger right on there and if it were a—it would pull straight away. It is something technical that has to be done with any plaster piece unless it was modeled originally for ceramics. This one was modeled originally for ceramics at that time.

Mr. Porter. You can cross-examine.

Cross Examination by Mr. Barnes.

XQ. You didn't have any particular model in which or subjects in which you made this model? A. No, no one dog.

XQ. You are a breeder of dogs yourself? A. Yes.

XQ. And you had photographs to make it from? A. I worked from a great many photographs at times to get expression, possibly. Only assistance, never copying an exact photograph.

XQ. And from your own dogs. Did you have any of these cockers yourself? A. I had a cocker at that time. I didn't consider him a standard model of perfection but I could have worked a great deal. You can't work from a photograph and make a three dimensional piece because you have no model from the top, you have no model from the sides, you have no model from the back.

XQ. You made a model in the first place and from these photographs and everything you did? A. Yes.

XQ. [Indicating] Is this the model? A. No. That is a cast piece from the model.

XQ. Is this the original model that you made when you— A. I made my original in plasticine.

XQ. And this is not it? A. No.

XQ. This is a copy that came from the model which you originally made? A. Yes.

XQ. And the model itself you haven't got? A. No.

XQ. It is not in the store— A. It is impossible. That has to be destroyed in the first cast.

XQ. You haven't got it any more? A. No one would.

Mr. Barnes. I have one question I want to ask my associates here.

[Brief pause]

XQ. It is a fact that in commercial art and the production of these items such as we have here that sometimes they do go stale; is that right? A. I don't know what the production—

XQ. They have a run and they go stale? A. There are pieces, as far as that goes, that have been selling for years and years and years. That would be more a technical problem—

XQ. When did you first examine that Woolworth dog?
A. About a month ago.

XQ. Where did you examine it? A. In my own home.

XQ. It was brought to you at your home? A. Yes.

XQ. And didn't you tell the man who brought it out there that that item was going stale? A. I didn't say it from my experience.

XQ. You didn't tell him that? A. No. I said that any line needs changing to keep abreast, as far as sale goes.

XQ. Of course in making up this original model you were using material and photographs which you had prior to 1942; that must be so. You said— A. Material and information.

XQ. Things were changing? A. Yes. The cocker has gone over a greater change than any other dog in the country.

XQ. Is this model you have here, that is from your original model, isn't it, this one here [indicating]? A. That is the one.

XQ. None of these changes you are talking about that have gone on since 1942— A. The dog has become slightly higher in the leg. The head is a little different today but there was a greater change some ten years prior to that in the cocker.

XQ. They are not made in this particular one that we have here; they are not embodied in this. The changes that have taken place since 1942? A. No.

XQ. That is the way it was at the time of the copy-right, the way you have it here? A. Yes. I still think that is the way it is.

The Court. I didn't get that answer.

The Witness. That is, yes.

XQ. Have you ever been to Zanesville, Ohio, or any part of Ohio? A. No.

XQ. You have never heard of the Burley Pottery Company there? A. No.

XQ. Nor Sabin Manufacturing Company? A. I wouldn't say that I did or didn't know Sabin. I have heard the name but if it is something I heard prior or not, I don't know.

XQ. As an expert in this line, you will agree that this is a pointing position of the dog, isn't it? A. No, that is the show position.

XQ. Isn't a hunting dog on the point— A. This particular dog doesn't hunt that way. He flushes his bird, he rushes at it or he sits. He doesn't go in any position of that sort.

XQ. This is the position they use in the shows? A. It is in the shows. It is a dog standing in a straight, normal, natural position with his head up.

XQ. In the awarding of prizes in these contests for a show dog, it is very difficult for any one who is not an expert to distinguish between several of the contestants, isn't it? A. It would depend upon—

XQ. If you have eight or ten dogs entered in the show, they all look pretty much alike? A. To a novice they would all look like black cockers or any other color.

XQ. It would require a judge to detect any subtle markings or something— A. It wouldn't necessarily be a judge but I have heard a great many people who are neither stand at the ringside and make comments.

XQ. As a matter of fact it is very hard to tell them apart? A. It is hard to tell anything of a similar—

XQ. And if in the making of a model or statue of a dog such as this where all the artists are absolutely true in every detail, there is no question but all the models would be alike? A. No, because their way of making them would be different. If you took a photograph of all the same dogs from the same light, exactly the

same conditions with the same camera, you would get differences. If you had different people taking photographs, you might get a different effect, but the human element has to enter into it, their knowledge, their skill, their way of doing something. It is almost like a dialect or thumbprint.

Mr. Barnes. That's all.

The Court. Your position is that whether that dog was sculptured in Zanesville, Ohio, or any other place in the country, the show dog, so-called, that that is a copy of the dog that you sculptured in 1942?

The Witness. In my opinion—what I would like to correct is this: in my idea, a copy is something someone sits down and makes just like something else.

The Court. They took a model of yours and sculptured—

The Witness. On top of it. Made the mould from here on [indicating], after having made superficial changes on the surface.

The Court. Would you clear up one other thing for me, Madam? Do I understand you to say—I think I took down your exact words, that this cocker spaniel dog which is the subject of these proceedings represented, as you used the words, a composite ideal dog, typical of the times.

The Witness. Of the times, my idea.

The Court. When you say typical of the times, do you mean the time around 1942 when you did that?

The Witness. Anywhere from the time the cocker started to come up on his legs—a cocker spaniel is now about that high [demonstrating].

The Court. Did you become familiar with the physical set-up of a cocker spaniel back in 1937 or 1938 and 1939?

The Witness. Yes, I did.

The Court. Was the cocker spaniel the same back in 37, 38 and 39, as he was—

The Witness. He was becoming that way rapidly through My Own Brucie; he is the dog that most everybody who has a cocker spaniel on the street says goes back to. He is the one, I think, above all that made that more of a stationary idea. There are some before him that had legs but that dog was gradually coming up.

The Court. You mean your dog?

The Witness. It is called My Own Brucie; that is the name of the dog.

The Court. Your model came from that dog chiefly?

The Witness. No, he was—

The Court. What I mean is this: you maintain that the cocker spaniel dog of 1942, in physical appearance, was different than the cocker spaniel dog back in 1938? Cocker spaniels changed in the last ten years?

The Witness. He has changed in the last ten years but I would say 1940 up for 10 years before 1940, up to 1940 he was in a very rapid change from short legged up to a higher. From there on he has had no changes.

The Court. It is your position the cocker spaniel dog you designed in 1942 was not in keeping with the cocker spaniel dog that lived in the period between 1935 and 1940?

The Witness. I would put it more 1930 to 1935 as a more striking change.

The Court. So that the cocker spaniel dog, as you designed, probably lived in 1937 and 1938 or 1939; is that right?

The Witness. I would say he is more as he is today than he was in 1930, let's say. It is a gradual change.

The Court. What about 1938?

The Witness. I think that is drawing a line I wouldn't want to make a statement on. I do know if you look back in magazines, they look very odd.

XQ. Have you any memory of the photographs you used in making up your model for the copyright of 1942?

A. I would not say there was any one in particular. I

only said I worked from photographs because I have at times. I don't remember using any photographs.

The Court. I think she testified, Mr. Barnes, as premises upon which she predicated her sculptural work as she went around to various kennels and saw dogs and talked to dog experts and made some study of the physical make-up of the dog and did not use any copies; is that what you said on direct examination?

The Witness. That's right.

The Court. You have a right to qualify her.

XQ. Well, you didn't take any prize winning dog and make that model up from— A. Not right from that one dog.

XQ. You had a composite, as the Judge put it, of a lot of characteristics of a cocker spaniel dog in mind when you sculptured that dog? A. I had my idea of the ideal and tried to copy standards. I talked with both judges and breeders and had them criticize it.

XQ. You were aiming at the production of a dog that would be a prize winner with the finer points of the dog in the show? A. Something that, at that time, would satisfy the breeders. That is where I felt the sculpture of animals was lacking, in that they didn't follow what the dog people wanted.

XQ. You think that model you worked out was fairly representative of what was showing as prize winning dogs at that time? A. It was accepted as such, yes.

XQ. And you have seen many prize winners who are almost a replica of that, haven't you? Many prize winning dogs who would answer to that description? A. Well, it is hard to say that. They should fit in as closely as they could. The expression—you can—you will find every dog has as different a face as a human.

XQ. You think in 1942 that dog you produced was then about the standard which would be a prize winner in a

show at that time; that was your purpose? A. That was my purpose.

XQ. That was a standard because it was the product of these shows that had been conducted previous to that time and it worked up to the 1942 standard; isn't that so? A. I don't know when the standard was changed last but the standard is what governs it, not really—it is a fad often, the interpretation of the standard. The standards remain fixed. The interpretation is more or less up to the judges—up to the current popular opinion.

Q. That would go through the dog shows which had been showing—for how many years have they run dog shows on cocker spaniels? A. Have as far back as the cocker, I suppose.

XQ. How far? A. My husband is a professional handler. He could give you a better idea.

XQ. Have you any idea of your own? A. Well, dog shows have been going on—I couldn't give you an exact date.

XQ. Fifty years? A. I think so.

XQ. At least? A. I think so.

XQ. And the cocker goes back that length of time, doesn't it? A. Yes, when he first came in he was almost the height of a dachshund [demonstrating].

The Court. You mean from the floor?

The Witness. No—very very low dog.

The Court. I suppose each decade has taken—works out pathological changes in every dog; isn't that right?

The Witness. More or less. The outstanding show winner is apt to change it a little.

The Court. The cocker spaniel of 15 or 20 years ago is different physically from the cocker spaniel of today. Because the spaniel of today is different from the cocker spaniel of 1942?

The Witness. I say there was less change there than there has been in the others. It had a gradual increase in length until today.

Redirect Examination by Mr. Porter.

RDQ. Just to make it clear, do I understand correctly your testimony with regard to the Woolworth dog, that you say that it is a mechanical reproduction taken from a plaster model of your dog and used as a mould and cast in the ceramic form? A. What do you mean by "mechanical form"?

Mr. Barnes. That question is very leading and I think she has already testified on the subject, your Honor.

RDQ. [Continued] I meant in commercial reproduction. A. Mechanically—I don't believe it was mechanically done. The way I would do it if I wanted to do the same thing would be to take one of these models and work on top of it with plasticine and change it in my own way and take the mould right from that.

The Court. She says the model of the ~~dog~~ is her model.

The Witness. It is my opinion it was ~~taken~~ off.

RDQ. Mechanically taken from it rather than— A. Nobody sat down and made it alongside of it. It was, in my opinion, done right on top of it. I don't know how it could be done any other way.

Mr. Porter. That's all.

ALAN FOX, Sworn.

Direct Examination by Mr. Porter.

Q. Please state your name, age, residence and occupation? A. Alan Fox, 40, 354 Beacon Street, partner of Fred Press in Contemporary Arts. I am in charge of the business there.

Q. And Contemporary Arts is a corporation? A. Corporation. We are about eleven years old.

Q. Will you give us some idea of the size of Contemporary Arts in volume of business yearly? A. Well, we averaged about \$35,000 a year. We have about 250 different models—over 200 models that we run, divided generally into two groups, the dog group and the figurines, and we have, I guess, eight employees plus ourselves.

Q. Did you say 250 designs? A. About that.

Q. How many are original designs? A. I think every one. We have bought one or two designs in the past but we use our own sculptors. Fred does most of our designing. We have used Elizabeth and we have had one or two other people on occasional designs.

Q. By "Elizabeth" you mean Mrs. Hall, whose pen name is Allen? A. Mrs. Hall. She has done most of the dogs.

Q. Mr. Press told us yesterday your retail selling prices of dogs in the plaster models is \$4 and in the porcelain is \$9 and red and black and white, \$15. Will you please tell us why you have to sell those dogs at prices like that? A. This is the average price—

Mr. Barnes. Is that of any consequence?

The Court. I think that will be helpful, Mr. Porter.

Mr. Porter. I was going to compare it with the Woolworth type product, sir.

The Court. Your witness said they were sold at these different prices. The dog with the black—that, there

[indicating], he said was \$15 retail. You were going to confirm what your partner said?

The Witness. Apparently, sir.

Q. Will you tell us in your dog designs whether or not you make an effort to obtain authenticity of design?

A. Well, we have to—

Mr. Barnes. Well, just a minute.

The Court. I suppose the thing before me, Mr. Porter, is whether or not there is infringement of the copyright and if there is infringement of the copyright, the damages are fixed, aren't they?

Mr. Porter. Yes, sir.

The Court. There is a maximum.

Mr. Porter. Yes, sir.

The Court. There is a yardstick?

Mr. Porter. Yes, sir.

The Court. Of \$10 applicable to each infringement and the number of dogs that were sold by the Woolworth Company has been fixed. There has been no dispute over that so the maximum couldn't be more than \$5,000, anyway. So how would your last question be helpful? If you feel it is, go ahead. Anything you feel would be helpful to me, reasonably, you may proceed.

Q. Who are the principal customers of these dog models? A. I would say about 65 per cent of our dog sales went to what we call the "dog crowd", kennel shops or dog clubs, that are used as trophies. Thirty per cent would go to the gift shops and gift departments of the better department stores.

Q. How about the buying public? A. They are mostly the dog crowd. The consumers who buy dog models can be divided into two groups, the person who just wants a dog of a given name and it makes no difference to them what the dog looks like or what the sculptural proprieties are that are involved but fully half the dog buying crowd

will be dog people themselves, to whom the anatomical qualities are important points. Our greatest following in our dog collecting is with the dog crowd, dog clubs, dog breeders, dog trainers and even judges who might use some of the dogs as standards in the ring. Unless we are satisfying them with our models, we don't get anywhere.

Q. Can you tell us whether you take troubles to obtain authenticity? A. Yes. We did get their interest, and they liked what we are doing. We kept along all the way and that is one reason why we used no one but Fred and Jan Allen to do our dog models.

Q. Do some dogs sell better than others? A. Generally speaking you will find the sale of the individual dog is in a general ratio to the popularity of that dog in the country. The only—there are slight exceptions to those tables of proportion and one or two of our dogs, we had an extra good sale, a sale beyond the proportion of dogs because we are the only ones that make that particular model or if we bring out a dog model that is exceptionally good and there is no competition from that particular model, its sale would be better than its proportionate existence in the country. Apart from those two factors, if you examine the tables of popularities, the individual popularities of our model and the breeds in the country, there would be a direct proportion.

Q. What are the principal, most popular breeds in the country at the present time? A. The cocker first of all, away above.

Q. What is the second breed? A. I am not too sure. The first five would include the beagle, the boxer, the setter and the collie and the cocker by far exceeded any other dog.

Q. Which of your dog models in the last six or seven years is your most popular selling article? A. The cocker is because of its—

Mr. Barnes. That answers the question, your Honor. He doesn't have to make a speech here. The cocker, that is his answer.

Q. And can you identify your cocker further by reference to Exhibit number? A. [Indicating] This is our plaster composition cocker here, No. 5.

Q. Is that the only cocker you have been selling in the last six or seven years? A. The only model? That is the only one we have ever had in the show position.

Q. And— A. We also have four color versions here and also examples in ceramics.

Q. And in your catalog that cocker is identified as 271? A. Yes.

Q. I understand from the copyright registration that this cocker spaniel in show position such as Plaintiff's Exhibit No. 5 was first sold in March, 1942. Can you tell us what your sales of that cocker have been since 1942?

Mr. Barnes. Your Honor, is that feature to be gone into?

The Court. In the light of the various sections in Title 17, what difference does it make?

Mr. Porter. I would want to show, your Honor, that the dog—

The Court. He already said it is the only one they had.

Mr. Porter. But I was trying to put in some evidence of the sales just—incidentally, Mr. Barnes asked me by telephone two days ago would I be sure to have that information in court.

Mr. Barnes. Is that anything to bring out before the Court? If I asked him then—I hadn't been through the trial up to that time. I do not ask for it now.

The Court. I don't think, Mr. Porter, to be very frank with you, that you need it. I indicated that yesterday. I thought your client felt that you

could go into showing a loss of profit. I didn't want to have him get a layman's point of view. That isn't the yardstick here. You then stepped in yesterday and said my yardstick is clear and it is.

Mr. Porter. Your Honor, if I may say this: the purpose of this testimony is to lay the foundation for an award of statutory damages. In all copyright cases, a plaintiff, artists and composers and everybody else, is confronted with the same problem, the difficulty of proving damages, and that is why the Copyright Act has had put into it that statutory damage section and I was merely going to indicate very generally the approximate number of dogs which had been sold and how the sales sharply fell off when the Woolworth competition appeared.

The Court. Of course it is a fact, Mr. Barnes, while that is the yardstick, the statute says the Court may fix as damages \$10 for each infringement and the amount in no case to be over \$5000 and the thing that bothers me most, Mr. Porter, is this: as I remember the provisions of one of the two sections of Title 17—this is my first copyright case of this type—as I remember that section, there is a phrase used, “and the damages can't be punitive”. I want to be careful to get away from that. I can understand your point of view and I have some sympathy for it. Is it your position that the Woolworth Company are not interested in the rights of persons, whether it is a patent right or copyright?

Mr. Porter. Yes, sir, that is precisely it.

The Court. They are only interested in selling that which can be sold and which they can buy from anyone and you would like to offer this evidence because it has some—

Mr. Porter. Some bearing on the damage done by the Woolworth kind of competition and copying.

Mr. Barnes. I have a further objection to it. It is not the best evidence. He is here testifying without any books or memoranda or something out of his head and I object to it on that ground, in addition to the one I have already stated.

The Court. Well, if he is the manager—

Mr. Porter. He can give an approximate idea—

The Court. I think it should be available to you for cross-examination.

Mr. Barnes. I don't think it is of any consequence.

The Court. I will take a recess now. I will let you know what my decision is.

Mr. Porter. Thank you, sir.

[Morning recess]

The Court. Mr. Porter, I have had little time to give to that because I had some other matters to take care of as emergency judge, but don't you consider that immaterial?

Mr. Porter. It is enough for me, as I believe Mr. Fox has already testified, to have him say that it was the largest selling dog in their line.

The Court. Suppose that question goes in, you don't object to that?

Mr. Barnes. No.

The Court. All right, you may have it. Was it the largest selling dog in your line?

The Witness. Yes, it was.

The Court. That goes in without any objection.

Q. Now, sometime you found, as has been established by previous testimony, a dog being sold in the Woolworth stores at \$1.19. Can you identify that as Plaintiff's Exhibit 2? A. Yes, sir.

Q. When did you first learn of the sales—such a dog was being sold? A. Some time in the spring that our agents told us a cocker was being sold by Woolworth—

Mr. Barnes. May it please your Honor—

The Court. Mr. Barnes objects to it. Someone else may have told him. When was the first time he heard of it?

The Witness. The first actual experience we had was when Fred bought it in New York in May. We went shopping in Woolworth stores to find out about it.

The Court. May of what year?

The Witness. 1949. I have forgotten the exact date.

Q. Do you attend the shows in your line? A. Yes, I go to the Chicago show and the New York show every six months.

Q. Can you identify the show? A. Well, half the selling in this field is done at the gift shows that come up every six months all over the country in the major cities. The biggest one is New York; that comes at the end of February and at the end of August, and the Chicago show at the end of January and the end of July. There are shows around that same general period in every major city. Those are the only ones I go to, New York and Chicago.

Q. Did you have any experience at the Chicago show relating to the Woolworth dog? A. The first serious objection, serious complaint we had was at the Chicago show from a dealer, Paul Canine Service—

Mr. Barnes. I object to that, your Honor.

Q. What was his—

Mr. Barnes. Just a minute. I will take the Court's ruling on it.

The Court. Why do you think that is relevant?

Mr. Porter. I was going to ask him what the complaint was and what they did about it,

The Court. Let's have the question read.

[The question is read]

The Court. That can be answered yes or no.

The Witness. Yes.

Q. What was that experience?

Mr. Barnes. That I object to, your Honor.

The Court. I haven't the slightest idea what he is going to say. Come up.

[Conference at the bench]

The Court. The question and answer are excluded on objection of counsel.

Q. When you found that the Woolworth Company was selling a cocker spaniel dog such as this Plaintiff's Exhibit 2 for \$1.19, will you please state what if anything happened to the sales of your own cocker spaniel dog in show position as shown in Exhibits 5, 6 and 7?

Mr. Barnes. I am willing to not object to the question as to the dates when his sales fell off but I object to the interpretation that it is the Woolworth dog—I think that is only an opinion. I don't think he can qualify it and give an opinion as to the reason why the sales fell off.

Mr. Porter. I can ask him the fact and ask him to explain in his opinion why and he will give detailed facts in that respect.

The Court. You still object, Mr. Barnes?

Mr. Barnes. Yes.

The Court. I will exclude it.

Q. Mr. Fox, since approximately July of 1949 have the sales of your cocker spaniel dog in show position fallen off? A. Yes. I state that from the very end of July, the beginning of the Chicago show. Our business in the spring is very light and doesn't mean very much. Starting with the Chicago show, starting a week before the Chicago show, our business takes a direct increase but our 271 cocker hasn't sold at all, starting with that show. We lost two of our big shops out there with the general complaint of copying.

Mr. Barnes. I ask that be stricken.

The Court. That may be stricken.

Mr. Porter. Your Honor, is it necessary for me to take exceptions here?

The Court. No, it isn't. I thought we settled that a few minutes ago by an answer this witness made to which there was no objection.

Q. Are you still making the cocker dog in show position? A. No.

Q. When did you stop making it? A. We had a fairly sizable stock we built up—

Mr. Barnes. That is not responsive, your Honor. He asked him when he stopped making it.

A. [Continued] The last time we manufactured the dog was in April or May.

Q. What year? A. Of last April or May.

Q. How much stock did you have on hand at that time?

Mr. Barnes. Well—

A. I can't tell you. What we built up at the time. We would have to check the record.

The Court. I think I will have to exclude that, Mr. Porter.

Q. Have you attempted to sell your cocker dog, Model 271, to the Ludlam Pet Shops here in Boston? A. Yes, sir.

Mr. Barnes. That I object to, your Honor.

The Court. I will exclude it. You see, Mr. Porter, the yardstick for damages is fixed by Congress. The only issue here is whether or not there was an infringement upon the copyright of a cocker spaniel dog that was sculptured by Jan Allen which legally and very properly came into the control of your client. That is the only issue. If it has, then the yardstick of damage is fixed. We don't disagree, so what difference does it make?

Mr. Porter. I am merely trying to show, your Honor, whether Woolworth competition actually killed the sale of this dog.

The Court. Suppose you show that the Woolworth competition killed it, what difference would it make any more than the difference of the testimony of Mrs. Allen that this particular dog was a dog where 50 per cent of the sales came from persons who were very, very familiar, I think she used the phrase, with the anatomical set-up of the dog and that this dog the Woolworth Company sold was a dog that was superimposed, if I use the right expression, on the dog she designed. If that fact is established, *a fortiori* damages flow from it and the yardstick has been changed, apparently. There is a certain yardstick for damages if there is an infringement shown on a poem, for example, or a book or writing of some kind, or a picture. It goes along *seriatim* and describes the yardstick the Court has to use and in no event can it be more than \$5000. This is a two-edged sword; it might help your case and it might hurt it. I

would like to have you feel I am not foreclosing you. Unless you have a more solid reason, I will have to exclude it.

Q. I understand you to say you have stopped the manufacture of your cocker dog 2711? A. Yes.

Q. Have you another dog to take its place? A. We have a new design ready that we designed in the summer—last fall—to replace our current design, once we get rid of stock.

Q. Who was the designer?

Mr. Barnes. Well, I object to that, your Honor. The Court. I will exclude it.

Mr. Porter. Will your Honor—I was further going to identify that new design as this dog, Plaintiff's Exhibit No. 4.

The Court. Well, Mr. Porter, how could it be of assistance to the Court in the light of the pleadings? You are seeking an equitable remedy and there is no suggestion of laches on your part or anything which could raise a defense it is a suit in equity and the allegations are very simple. The answers are such you could very easily join issue on and we have two issues to settle.

Mr. Porter. Well, your Honor, just to make my position clear, I will admit the difficulty in every copyright case in this as in others, of proving actual damages and of necessity we have to fall back and invoke the statutory damage check. I was merely going through the procedure of showing the difficulty.

The Court. If you establish this was an infringement of copyright, it is inescapably clear there is enough evidence in this case upon which to predicate damage up to \$5000. I don't think Mr. Barnes disagrees with that, do you?

Mr. Barnes. No, your Honor.

Mr. Porter: Well, your Honor, I would like to ask the witness one question, and that is why he withdrew or ceased the manufacture of the cocker dog 271.

Mr. Barnes. That I object to, your Honor.

The Court. I have no desire to foreclose you, Mr. Porter, but I really don't think it is helpful to the Court.

Mr. Porter. My offer of proof in that respect merely was that it was due to the Woolworth competition which killed that dog as a desirable model sought after by dog fanciers. That was the purpose of it.

The Court. Suppose I should find that wasn't so and suppose that the Court found there was an infringement, suppose the Court found the allegations set up on your complaint, how could that be helpful to me in assessing damages? It couldn't be. Don't you agree with me on that?

Mr. Porter. Yes, sir.

The Court. So that I will exclude it.

Mr. Porter. Yesterday, your Honor, a letter was shown to the Court which was written by Contemporary Arts and signed by Mr. Fox and because that letter was shown to your Honor I would like Mr. Fox briefly to explain the letter. Can you produce it, Mr. Barnes?

Mr. Barnes. I think the letter speaks for itself.

The Court. Wasn't it offered?

Mr. Porter. It was not offered in evidence. It was offered during a discussion off the record by Mr. Greenawalt but Mr. Greenawalt made the representation that Mr. Fox was soliciting the Woolworth Company to sell their dogs, which is a very misleading impression, if the facts are known.

The Court. I tell you very frankly, you can be certain I am not impressed by anything except that which comes from evidential channels. In-

asmuch as that letter is not before me, I will not regard it as evidence.

Mr. Porter. That is enough for me.

Mr. Greenawalt. He has put that statement on the record but that letter was shown to offset a statement he made to the effect the Woolworth Company was selling inferior merchandise. I wanted to show the Court they, themselves, wanted to sell us merchandise. It isn't evidence or isn't before the Court; it was a statement they made which I was trying to offset.

Mr. Porter. Would you like to put the letter in evidence?

Mr. Greenawalt. It has no relevancy.

Mr. Porter. You can cross-examine.

Mr. Barnes. I have no questions.

The Court. I will only be influenced by questions that come from witnesses on this witness stand.

Mr. Barnes. No questions.

Mr. Porter. That is the plaintiff's case, sir. Let me check one moment. I believe it is. [Brief pause] The plaintiff rests.

SAM SABIN, Sworn.

Direct Examination by Mr. Barnes.

Q. Your name, Mr. Sabin? A. Sam Sabin.

Q. And you are in the Sabin's Manufacturing Company of McKeesport, Pennsylvania? A. Yes, sir.

Q. That is a partnership, is it? A. Yes, sir.

Q. And do you live in McKeesport? A. Yes, sir.

Q. And you are here from McKeesport for this trial?
A. That is correct.

Q. Now, this dog which is known as the Woolworth dog, Exhibit 2, are you the one that sold that dog to the Woolworth Company in March, April and May of 1949? A. Yes, sir.

Q. And did you manufacture that dog? A. No, I did not.

Q. And where did you obtain the dog from? A. Well, we act as factory distributors on certain items and we obtained this dog from LaPere Pottery, Zanesville, Ohio.

Q. And the items—in the course of your business, you sell other items to the Woolworth Company, do you? A. That is correct.

Q. And this particular cocker spaniel is one of the items, and it was already testified to, which was sold in March, April and May and the amounts and the prices by you; is that correct? A. That is correct.

Q. And what did you do in regard to it? You didn't manufacture it; did you ship it? A. Acting as distributor for several of these small potteries, they have no facilities for packing and things of that type so we send our trucks to these potteries. They bring them into our plant and we either decorate or repack and ship it. That is what was done with this particular item.

The Court. Can you fix the date of the shipment—date of the purchase?

The Witness. The date of the purchase, Mr. Lindquist of the Woolworth Company placed an order with us some time in January of last year and we made shipment during the months of March, April and May.

Q. Have you ever sold any other of these dogs to the Woolworth Company at any time except the dates we have given? A. That is correct.

Q. Have you discontinued the sale of the dog? A. Well, since we received a letter from the Woolworth Company that this was an infringement on a copyright,

we automatically discontinued. We have so many other items, a dog of this type didn't mean anything to us.

Q. You have no intention of doing anything more with it? A. We have no intention of bothering with it any more because there wasn't enough sale on this particular dog. The sale dropped off on this dog and it was not selling.

Mr. Barnes. Your witness.

Cross Examination by Mr. Porter.

XQ. In the transaction in which Woolworth Company ordered the number of the cocker spaniel dog similar to Plaintiff's Exhibit 2, will you please tell us where that transaction occurred? A. Where the transaction occurred—you mean where he placed the order?

XQ. Were you in New York City? A. It was during the January show where Mr. Lindquist visited our plant and, going over all these items in our factory, we have quite a number of items on display, he picked out several other dogs; he thought he would try these dogs.

XQ. He bought from a sample which was in your showroom? A. That's right.

XQ. At McKeesport? A. That's right.

XQ. Was the sample which you had to show him substantially like the model which is Plaintiff's Exhibit 2? A. That's right.

XQ. You said that your procedure is to buy directly from the pottery and I understand these dogs you bought from LaPere Pottery in Zanesville, that you also do some decorating processes. Will you state what processes you did in this particular case? A. In this case we didn't do anything to these dogs. We shipped them as they were. Ordinarily we would take the dog and put gold all around.

Mr. Porter. That's all.

The Court. How long have you known the LaPere Pottery Company?

The Witness. I used to buy often back in 1939.

The Court. That is, you have been buying from them since 1939?

The Witness. Yes.

The Court. You have had occasion to talk to a representative of that company three or four times a year, probably, from 1939 down to January, 1949?

The Witness. Well, I would say,—

The Court. Just answer yes or no.

The Witness. I would probably say more.

The Court. During all the times you saw a representative from LaPere Pottery Company, they never showed you that particular dog until January, 1949?

The Witness. Oh, no, they have had different dogs down there for years. I have seen them every time I went down. Ordinarily they make up special items for me. This particular is theirs.

The Court. When did you see it?

The Witness. Actually, I can't give you an exact date but it was years—when I went to the Army—

The Court. You thought it was a good dog to buy, didn't you?

The Witness. After this war, we have been looking for new numbers because all the business fell off and we were trying to—in fact, in the last two years we have taken any numbers we could get hold of.

The Court. Do you remember distinctly seeing that dog in 1939?

The Witness. I cannot say I can remember distinctly.

The Court. Do you remember seeing that dog in 1940?

The Witness. No, I can't.

The Court. Do you remember seeing it in 1941?

The Witness. No, I can't, because it does—

The Court. That's enough. Do you remember seeing it in 1942?

The Witness. No.

Redirect Examination by Mr. Barnes.

RDQ. Do you remember when you first saw that dog in LaPere's? A. The reason why I never seen this dog is that LaPere Pottery is just a small factory. They only have one room shop. The items they made were never on display. They may be making dogs today and the next day they are making elephants. They might average 250 to 300 items, maybe more, and they never had these items on display.

RDQ. Do you remember when you first saw the items? A. Well, after I come out of the service is when I recognized the item because being in contact with this pottery, we never got to see the items they made because they made many items for different factories.

RDQ. You saw that when you got out of the service? A. That's right, in the past several years I have seen this dog. Other than that I never paid any attention to the dog. I went down and picked up whatever I ordered and that was the end of it.

RDQ. When did you get out of the service? A. 1945.

RDQ. Do you remember it back as far as 1945? A. I do.

Mr. Barnes. That's all.

Recross Examination by Mr. Potter.

RXQ. When do you say you first had that model cocker spaniel to show to anyone at your plant? A. Well, it was, I think, in December of 1948 when we were deciding for the show that we needed a lot of new items to bring out. At that time I had traveled over all the potteries and I picked up samples from all these different factories that I was going to put in the January show. At that time this was one of the items picked up.

RXQ. So it entered the plant at McKeesport for the first time in December, 1948? A. 1948, yes.

The Court. That is the first time you saw it, in 1948?

The Witness. No, I have seen this dog before 1948.

The Court. Well, when? Was it after 1945?

The Witness. Right after 1945.

The Court. That's all.

Redirect Examination by Mr. Barnes.

RDQ. Was the notice you got from the Woolworth Company that there was an alleged infringement of the copyright?

The Court. No, the very words he used was that there was a letter saying there was an infringement on the dog. That was his testimony, wasn't it?

The Witness. Let me hear that question.

RDQ. What was the notice you got from Woolworth Company? A. The notice was a letter that this dog was an infringement of another dog.

RDQ. Well, all right. Do you know whether or not it was a copy of a letter the Woolworth Company got from Contemporary Arts that you saw? A. That's right.

RDQ. What was it? They sent you a copy? A. They sent us a copy that this dog was an infringement of a dog made by Contemporary Arts.

RDQ. Who sent the letter? A. Mr. Smith sent the letter from the Woolworth Company. We got the letter from the Woolworth Company. I think there is a copy in my bag.

Q. Have you got a copy of the letter you got in your bag? A. I may have.

Mr. Barnes. May we take time to look for it, your Honor?

The Court. Oh, sure.

Mr. Barnes. See if you can find the notice you got.

[The witness hands paper to Mr. Barnes]

Mr. Barnes. Here is a letter dated June 9, 1949, and addressed to the Sabin Manufacturing Company and signed by Mr. Lindquist of the Woolworth Company on the letterhead—I want to clear that point. I would like to have that letter go in.

The Court. You don't object to it?

Mr. Porter. No, sir.

[Letter from Woolworth Company to Sabin's Manufacturing Company dated June 9, 1949, marked Defendant's Exhibit E.]

The Court. Why don't you read it into the record?

Mr. Barnes. This is a letter from the Woolworth Company, June 9, 1949, to Sabin's Manufacturing Company [reading]

"Gentlemen:

We have a communication addressed to our 39th Street and Fifth Avenue store in New York, dated May 23rd, from a firm of attorneys known as Dolan, O'Neil and Balch of 85 Devonshire Street, Boston, Mass. in which they advise us that we have a ceramic Cocker-Spaniel in show position on our counters which is an infringement of a copyright which is held by their client, the Contemporary Arts, Inc.

They state that this is U. S. Copyright G. Pub. No. 39960 dated March 26, 1942.

We believe the only ceramic Cocker-Spaniel we have in Show Position on our counters is your #301, so we are assuming that they do refer to that item.

We have written to their attorneys, however, under date of June 3rd, asking them to kindly send us a sample of the item in question so we can see just which item they do refer to.

We have written to Washington for a copy of this alleged copyright and as soon as we have all the facts and it proves to be your item #301, we will advise you further.

Yours truly

F. W. WOOLWORTH COMPANY

By H. H. LINDQUIST"

Mr. Barnes. That's all the questions I have for this witness.

Re-cross Examination by Mr. Porter.

RXQ. I was wondering if you replied to that letter to Mr. Smith and if you will produce your letter of reply?

A. I imagine we should have a reply of that letter. Mr. Fink of our office takes care of that. He may have a copy of it. [Examining papers] I don't have a copy of it.

The Court. You expect to produce the original, Mr. Porter?

Mr. Porter. What, sir?

The Court. Do you expect to produce the letter?

Mr. Porter. I am referring to your letter of October 31, 1949, to the Woolworth Company, Mr. A. Q. Smith, Assistant Secretary. Mr. Smerdon has one in his file, the Sabin letter to the Woolworth Company of October 31, 1949, that you showed me a few weeks ago.

The Court. Do you know the one he is talking about?

The Witness. The copy was sent the Woolworth Company. I don't have those letters in this file. They would be attached to the original. Does Mr. Smerdon have a copy of it?

The Court. You say you saw the letter, Mr. Porter?

Mr. Porter. Mr. Smerdon showed it to me a few weeks ago, sir.

Mr. Smerdon. Which letter do you want now? You have asked for several.

Mr. Porter. October 31, 1949, Sabin to Woolworth, A. Q. Smith, Secretary.

Mr. Smerdon. Have you got a copy of what you want?

Mr. Porter. No, I haven't got a copy. At your office I made a handwritten copy myself.

Mr. Smerdon. You mean where we showed what was sold by Sabin to Woolworth at 34 stores? That is an exhibit.

Mr. Porter. No, that is the order. I was asking for Sabin's letter to Woolworth, October 31, 1949.

The Court. You say you saw the letter?

Mr. Porter. Yes, sir, I made a handwritten copy of it in his office with his knowledge. I read it.

Mr. Smerdon. Do you know the color of the paper?

Mr. Porter. No, I don't. Sabin letterhead.

The Witness. It would be white.

The Court. Didn't you bring copies of all your correspondence?

The Witness. No, I didn't bring all those with me because I generally don't take care of the correspondence.

The Court. You knew you were going to testify here as a witness, didn't you?

The Witness. That is true.

The Court. Why don't you read the copy you made to Mr. Barnes now. Let him see it.

Mr. Porter. At Mr. Smerdon's office some time ago he showed me this letter in question.

The Court. Why don't you show it to Mr. Barnes? Here it is.

[Mr. Smerdon hands paper to Mr. Porter]

Mr. Smerdon. It was clipped on to that other. I had to pull them apart to put that in as an exhibit.

Mr. Barnes. There is the letter, your Honor.

The Court. Probably you could refresh your recollection.

[The witness examines paper]

Mr. Barnes. That is your signature?

The Witness. That is one of the girl's signature, authorized to sign my name in a letter like this. This letter is all right. It just states the amount of dozens sold.

The Court. There is no objection to the letter?

Mr. Barnes. No.

Mr. Porter. I would like to offer it in evidence, sir.

The Court. It may be marked as a plaintiff's exhibit.

[Letter dated October 31, 1949, from Sabin's Manufacturing Company to F. W. Woolworth Company marked Plaintiff's Exhibit No. 15.]

The Court. I think Mr. Porter or Mr. Barnes, you should read it.

Mr. Barnes. This is dated October 31, 1949, Sabin's Manufacturing Company to Woolworth Company [reading]

"Subject: Cocker-Spaniel

Dear Sir:

In regard to your recent letter, I am sorry this was not answered sooner but I have checked quite thoroughly into this matter. We have purchased these moulds from a pottery who has been making this dog since 1936.

Please be advised that he states this was copied from a glass dog made in England. However, he is trying to find the original of this dog and up to the present writing we have been unable to secure this sample. However, we would like to know when this copyright was put into effect.

The amount involved in this matter is rather small as checking through our records we find we have shipped a total of 127 dozen to your stores. This was shipped as follows:

March—23 dozen May—60 dozen

April—44 dozen

Since that time we have not received any orders for this item. In view of the fact that the quantity is so small, we are wondering what the best thing to do in this matter. As soon as I can get further information for you on the original of this dog, I will write you.

✓ Please let us know what we can do on this matter. We will go along with you and assume all cost regarding any damage or expense connected therewith.

Very truly yours,

SABIN'S MANUFACTURING COMPANY

SAM SABIN"

RXQ. I wanted to ask Mr. Sabin who the pottery was he was referring to that you purchased that dog from?

A. LaPere Pottery.

RXQ. LaPere Pottery in Zanesville? A. Yes.

The Court. Have you finished? Any further questions?

Mr. Porter. No, sir.

HARRY MOYER, Sworn.

Direct Examination by Mr. Barnes

Q. What is your name? A. Harry Moyer.

Q. Mr. Moyer, you live where? A. R. F. D. 4, Zanesville, Ohio.

Q. And you have lived in Zanesville, Ohio all your life? A. All my life, yes, sir.

Q. Zanesville, is that the city known as the "Clay City"? A. Oh, yes.

Q. And what is the interpretation of that "Clay City"; what does that mean? A. It is—clay has been found in that locality and been used in that territory through there for making tile, pottery and all types of ceramics. There are various types of clay in that locality and there have been potteries in there—there is a history, I don't know how far it goes back. It goes back better than 100 years.

Q. What is your business? A. I am modeler and blocker and caser for LaPere pottery.

Q. How long have you been a modeler of pottery? A. I have worked it for, I expect 25 years, modeling and block and casing.

Q. And do you do some other work outside of LaPere; do you do free lance work? A. Oh, yes, I free lance on modeling, designing.

Q. And have you got copyrights at different times for your models? A. Yes, sir.

Q. And did you get that copyright which is marked in here as an exhibit in 1950 on a cocker spaniel dog? A. Yes, sir.

Q. You have been connected in modeling and dies and producing moulds from block moulds, is that the description of your work? A. I didn't quite understand the question.

Q. Just what does your line consist of; what do you do? A. Making models, designing—making up designs and models plus taking the master mould from the models

and also help prepare the dies for manufacturing of pottery items.

Q. Now, some time in 1938 were you connected with another pottery concern in Zanesville? A. I worked for Burley Pottery Company.

Q. And at the time you made—you worked for the Burley Pottery Company did you own a cocker spaniel dog of your own? A. Yes, sir.

Q. And you have owned dogs more or less, have you? A. Well, I have always had dogs. I have raised hounds many times. Mostly specialized in hounds but this cocker that I had was a present given to me by a fellow who raised good dogs.

Q. He was an Ohio man, was he? A. Oh, yes, Davis Kennels.

Q. What did you do with reference, if anything, to using that cocker spaniel that you owned as a model for your work of art? A. Well, the cocker spaniel I had was of an English breed. The hair was ying in folds and represented this very much as in this dog right here [indicating] and I cut it almost identical although still, it being a novelty, it does not have to be just exact as a dog would appear because that has been my business, mostly, has been novelties.

The Court. Keep your voice up, please. We have difficulty hearing you. Will you read the latter part of his answer?

[The answer is read]

Q. Is that exhibit of the Woolworth dog which is No. 2—is that a model of your dog that you made—

Mr. Porter. I object as very much leading, your Honor.

Q. Well, what is the Woolworth dog a model of and where did you make it and when? A. That dog there was made at LaPere Pottery and it is an exact dog of the one which I made for Burley Pottery in 1938.

Q. From what dog did you use as a subject for making that model in 1948? A. I made my own model in 1938.

Q. From what dog? A. I used my own dog.

Q. [Handing] I show you a model of a cocker spaniel in show position and I ask you to tell the Court whether or not that is the model from which the Woolworth dog was taken? A. If that is mine, it is. I could not say this is the model used in making this [indicating] but from what I know of the business of LaPere Pottery, this was in the cabinet of LaPere Pottery when I went there in 1945 and there is dies made and this one is an exact duplicate of the dies. It is as exact as the one I had made in 1938 with the Burley Company.


Q. Did the Burley Company go out of business in 1938? A. Oh, yes, they folded up.

Q. Do you know whether or not some of the stock of the Burley Company went to LaPere? A. Yes, there are several items there which they must have purchased or which some way or other they have got from the Burley Company because I myself personally have modeled the items which they have.

Q. [Indicating] You say this one here is a replica of the one you made with the Burley Company in 1938? A. That's right.

Q. Is it your opinion this Woolworth dog that was manufactured by the LaPere Pottery Company was made from this or a similar model of the dog model you made in 1938? A. Yes, sir.

Q. Will you tell us something about the Burley Pottery Company when you worked with them in 1938? A. I could give you the history—the best I can do is give you the history. Mr. Burley and the two sons purchased the pottery from the Weller Pottery Company known as the No. 2 plant in 1936. In 1937 Burley Pottery burned down. The insurance, I think, to the best of my knowledge, was collected by the Weller Company and the Burleys tried to start in business again with a smaller plant about one-tenth the size of the original plant. They



started making novelties and I went to work for Burley and made up several novelties and several other items of various kinds to help them get started; get them back in business, and they folded some time in 1938.

Q. And after that where did you work? A. Weller Pottery.

Q. With the same line of work you did with Burley? A. Novelties and art.

Q. And then you went with LaPere in 1945? A. I went with the Shawnee Pottery before.

Mr. Barnes. I want to offer this model here, your Honor.

[Sample of cocker spaniel statuette, grayish plaster, marked Defendant's Exhibit F.]

Q. [Indicating] This model, which is Defendant's Exhibit F, Mr. Moyer, I see the legs are broken off and put on again? A. That could have been caused by someone taking the mould from this model which the expansion of plaster in here would snap the legs off.

Q. Is there something or other about the plaster of paris expanding? A. Oh, yes, plaster expands as you mix the plaster and water together and the setting takes place and the heat expands it so it causes snaps.

Q. Now, Mr. Moyer, have you examined the Woolworth dog which is plaster model No. 5 here? A. I examined that one that was—

Mr. Porter. That is our dog.

Q. I mean Contemporary Arts dog, Exhibit No. 5. A. I examined one which was shown to me sometime last fall, I believe.

Q. [Handing] Is that the dog that was shown to you? A. It looks very much like it, sir.

Q. And that was shown to you by whom? A. Mr. Sahin.

Q. Was that represented as one of the Contemporary Arts dogs or what was the representation? A. That was represented as a Contemporary Arts dog, yes, sir.

The Court. Who was it that represented it as a Contemporary Arts dog? Do you challenge the fact this is a Contemporary Arts specimen?

Mr. Porter. I will show it to our people. [Brief pause] We would say it is a Contemporary Arts dog and bears the copyright on the left hind foot.

The Court. I just wanted it settled so there would be no question of doubt about it later on.

Q. Is this plaster [indicating]? A. It appears to be plaster, yes, sir.

Q. And this Exhibit 5 of the plaintiff, is that a plaster dog? A. I would say that was plaster, yes, sir.

Q. Would you say that Exhibit 5 looks like the dog you have just identified here, identical?

Mr. Porter. I object, your Honor. He is grossly leading.

The Court. I think we will recess now, anyway, and I am coming back at two o'clock instead of two-fifteen. Will we be able to finish pretty well by four o'clock?

Mr. Barnes. I have one more witness to testify as an expert after this one.

The Court. I think it is better for us to come back at two o'clock today.

[Noon recess]

Afternoon session.

HARRY MOYER, Resumed.

Direct Examination by Mr. Barnes; Continued.

Mr. Barnes. Now, I would like to have this marked as an exhibit. I understand there is no objection to that; that is one of the dogs of the defendant—

The Court. It was agreed that was.

[Sample of cocker spaniel statuette, black plaster, by Contemporary Arts, marked Defendant's Exhibit G.]

Q. Now, this exhibit G was a dog you made your comparison with, with the Woolworth dog; is that right? A. That is right.

Q. Before I take that up, what is your job with LaPere, in charge of the moulding department? A. Foreman of the mould department and modeler.

Q. Can you tell me something about some of the things you do with regard to students of Ohio State? A. I don't have a school. I just work with the students at Ohio State.

Q. Will you address the Court and keep your voice up? Just talk up so the Court— A. I work with the students at Ohio State University. They come to LaPere Pottery to get actual experience of making ceramics. I work with them on the moulds and models, all done free, no charge whatsoever, just give my free time and material.

Q. How far is it from Ohio State to Zanesville? A. About 54 miles.

Q. They make that trip to go into the practical art of — A. That is right.

Q. And are there any professors that go to you? A. The only professors I ever had come in there was from an art college in Dayton, Ohio. I don't know the exact name of the college. There has been some of the teach-

ers up there that came to me and asked if I would work with them on certain problems which I did on certain problems they were having with art. It happened to be they were people who learn, not from actual experience, but books who were trying to teach others.

Q. When this Woolworth dog was made, it was sold in March, April and May of 1949 and I assume it was some time before that that that dog was made up in the LaPere Pottery Company; is that right? A. Oh, yes. They have been making a few of those dogs since 1945. That is when I went to work for LaPere's.

Q. And the dies that dog was made from came from where? A. I don't know where they came from. They were there when I went to work for LaPere.

Q. What comes first, the model, the dies, the mould—
A. The model comes first, then the mould, then the dies for producing moulds.

Q. Now, this Woolworth dog, whether or not that was made up from your dog that you had, in 1938, invented—modeled at the Burley Company; is that a fact?

Mr. Porter. I object to that, your Honor.

* Mr. Barnes. Strike it and I will ask you this way.

Q. Will you tell the Court where this Woolworth dog came from and how it came to be manufactured in the LaPere Pottery Company? A. How it came to be manufactured at LaPere, I don't know. I don't know just exactly how they come to have this dog. The dog really was my dog which I let the Burley Company use the dog.

Q. [Indicating] And this model here, which is Exhibit F, is that a replica of the model which you made from your own dog in 1938 when you were with the Burley Company? A. It looks exactly like the one I made in 1938.

Q. And did the Burley Pottery Company manufacture dogs in 1938? A. They did.

Q. From your model? A. Yes, sir.

Q. And where were they sold? A. Mainly to roadside stands and pick-up jobbers.

The Court. Do you know that of your own personal knowledge?

The Witness. Oh, yes.

The Court. Did you sell them to the roadside stands?

The Witness. No, I was working with them.

The Court. Do you know of your own personal knowledge?

The Witness. Yes, sir. There were pick-up jobbers came in there, small trucks.

The Court. Bought from you?

The Witness. They bought from Burley.

The Court. I will exclude it.

Q. Well now, have you ever seen any of those dogs in any roadside stands that came from Burley? A. That I would not say. I very seldom ever canvass roadside stands.

Q. Were those dogs made up under your supervision in the Burley Company? A. Just the moulds.

Q. And were they manufactured there?

The Court. If you know.

A. Yes, they were manufactured there; I saw them.

Q. Have you seen them going out of the Burley factory?

A. I saw them packed and loaded in the trucks.

The Court. What year?

The Witness. In 1938.

Q. I would like to have you point out to me, if you will—

The Court. You modeled that dog, didn't you?

The Witness. The original, yes.

The Court. Did you get any royalty from it?

The Witness. No, sir.

The Court. Ever ask them to give you any money arising out of the sale of that particular dog by them?

The Witness. I wanted to sell them the model.

The Court. They used it. You knew they were using it, didn't you?

The Witness. Yes, sir.

The Court. Did you ask them for any money?

The Witness. I asked them to pay for the model and they promised to pay for it when they got going as they did several other models I made for them.

The Court. Did they ever pay you?

The Witness. No, sir.

Q. Did they ever get going? A. No, sir, they folded. That is the reason I never received pay.

The Court. How long, to your knowledge, did they ship this so-called Woolworth dog out in 1938? How long did that continue?

The Witness. I would estimate about five months.

The Court. You saw it being shipped out frequently, didn't you?

The Witness. Yes, sir.

The Court. Never sought the professional, legal advice as to what your rights were, did you, in connection with that?

The Witness. No, sir.

The Court. Did you only make one model, Mr. Witness?

The Witness. Yes, sir.

The Court. Is that the model on which the legs are broken?

The Witness. No, sir.

The Court. Where do you suppose that would be?

The Witness. I don't know. It was in the cabinet in LaPere. I never knew where it came from.

The Court. Where is yours, the one you did?

The Witness. It was thrown away, probably at the time I made the block mould and the dies.

The Court. Those were the only ones, you had the block moulds and the dies?

The Witness. And moulds.

The Court. So that whatever LaPere Pottery sold, you never gave them the model?

The Witness. No, sir.

The Court. You don't know how they got that model?

The Witness.. No, sir.

The Court. Did you ever tell the LaPere Pottery Company it was your model?

The Witness. Yes, sir.

The Court. Ever pay you any money for it?

The Witness. No, sir.

The Court. Who do you work for now?

The Witness. LaPere Pottery.

The Court. That was back in—how long have you been working for them?

The Witness. Since 1945.

The Court. And the last five years you have never collected five cents for the use of a sale of a dog which you say was your own—

The Witness. That is right.

The Court. —your own product?

The Witness. That is right.

Q. Now I want to ask you to point out to the Court, if you will, some of the distinctions between the Woolworth dog and the Contemporary Arts dog which is this last exhibit G, this black dog and the Woolworth dog. Will you kindly point out to the Court, the marked distinctions—

The Court. Did you ever study art in any school?

The Witness. No, sir.

The Court. You do not pose as a sculptor, do you?

The Witness. No, I don't.

The Court. Never had a training of any kind?

The Witness. But I have—

The Court. How can he qualify to testify to that?

Mr. Barnes. He is a practical man, your Honor. He has made these moulds and models as a free lancer in the business. He has copyrighted articles. He is a practical expert on this matter.

The Court. The only experience he said he had is that he had a dog that was a cocker spaniel and that he made a mould of that dog and that that mould was destroyed, as far as he knows. He never saw it afterwards but this one isn't the one he made; it is a copy and he didn't make it. He never went to a school of art except that he had people come to see him from Ohio State. He is foreman of the moulding factory there. Do you object to this testimony?

Mr. Porter. Yes, sir, very much.

The Court. I will exclude it on the grounds he hasn't qualified as an expert sufficiently to give this testimony.

Q. Have you got other sculptures and works of art that have been copyrighted outside of this? A. I have, sir.

Q. And what are they; what do they constitute? A. I have some music instrument banks, musical instrument wall planters and table planters. I don't have any animals. I have some artistic wall pockets. I have several items and I haven't copyrighted any but this one for some period of time. I would not copyright that had it not been for the question of whose dog it was.

Q. Would you show me some statuettes you had here with you that you brought along in your room the other night? A. I have a sample case in the room up in the hotel.

Q. What are those articles? A. I have a cowboy, a cowgirl, football player, baseball player, a jockey, a pilot in the Air Corps. I have a miniature football.

Q. Are those designed and modeled by you? A. I made, yes, sir.

Q. Where did you make those? A. At my home, which I have a shop at the basement, and at the LaPere Pottery which I use there free lance.

Q. And are they in commercial use? A. Some of them are, yes, sir, and some of them are new.

Q. And are they made in line with your work with the LaPere Pottery? A. Part of them are manufactured by LaPere and part of them are manufactured by other plants which I free lance with.

Q. And LaPere pays you a salary or do you get paid for the piece. A. I get paid on a salary basis.

Q. And on the free lancing you do with other companies, how is your compensation there? A. That there—LaPere Company allows me to use any part of the plant or anything within the plant for my own use for free lances and I charge the other accounts accordingly to what the actual cost is of the work I do.

Q. Are any of these other items copyrighted which you have there? A. Yes, part are copyrighted and part have not been sent in for copyright yet as they are the first samples out. I have not set a unit sale. I did not make a practice of copyrighting entirely until some people got to bothering me.

Mr. Barnes. I think, your Honor—

The Court. The thing that bothers me, Mr. Barnes, this is a dog. Did you ever make any—assume any research work in connection with the peculiar characteristics of the type of dog involved in this suit?

The Witness. Not just exactly research work but I have worked with some very fine sculptors who had tried to teach me something about sculpture.

The Court. In connection with a dog such as this dog?

The Witness. Not with the dog, no, sir.

The Court. That is, you know nothing about the peculiar characteristics of the type of dog that is involved in this suit, do you?

The Witness. Not too much, no.

The Court. Well, I will admit the evidence. It goes to the weight of it.

Mr. Porter. All right, sir.

Q. Now, taking the two dogs, Woolworth dog and the other, Contemporary Arts dog—

Mr. Porter. Why don't you take Contemporary Arts dog, Exhibit No. 5?

Mr. Barnes. The only reason I don't is because this white dog, which is a Contemporary Arts dog, is the one he has compared before he took the witness stand. This one here [indicating] is, I think, probably a replica of that but I am not sure of that.

The Court. You have a right to take him on any of these exhibits in cross-examination.

Mr. Barnes. I think the exhibit to use is the one he examined before he took the stand.

The Court. I think you have a right to use any exhibit you see fit and counsel for the petitioner has the same corresponding right to use any exhibit and to test his qualifications.

Q. In the first place I want to call your attention to the ears of the Woolworth dog and the ears of the Contemporary Arts dog. Can you point out any marked distinction between the two and show it to the Court?

The Court. I ask you to have in mind, Mr. Witness, that you have qualified as an expert to distinguish the characteristics in the dog such as the dog that is the subject of these proceedings and you will have in your mind you have already answered that you know nothing about these dogs.

The Witness. I know nothing about the breed of the dog, sir, but these two dogs, there is a difference between these two dogs. In the ears, there is a difference in the ears. It is flat in the fore part of the ear. That

was made that way probably for production. It is much closer in here [indicating]. The ears come closer together than it does on this other dog. The feet are round on this dog and they are sharp on this dog here.

Q. There are two distinctions— A. [indicating] Here at the rear of the dog there is very much difference in these two dogs. The rear of the dog here, between the legs, very much different. This dog has been modeled for the purpose of making pottery and this being able to take out of a rubber mould, could have more details on it.

The Court. That is, the real differences from your point of view are the feet, the opening between the ears that is down on the neck, so-called—

The Witness. Yes, sir.

The Court. And the—

The Witness. On the front of the ear there is a flat surface and—

The Court. The part below the tail?

The Witness. On the rear of the dog between the legs there is a difference.

Q. What do you say about the tails? A. There is a little difference in the tail [indicating]. This one has hair on it. It shows a large growth of hair over the body and over the tail where this one here does not show those folds quite so much. This tail here appears to be more pointed than the one on this one.

Q. The difference in the tails—now, what does “whorls” mean? Are there whorls or what are they? A. Not exactly call them whorls. [indicating] This is hair. Those are supposed to represent the fold of the hair where the coat is very heavy. In the time this was made, an English type spaniel which I have, and that was the type of hair that was on it. It was very heavy coated.

Q. Is there any such coat on the Contemporary Arts dog? A. It doesn't show such a coat on the Contemporary Arts dog. It looks to me like it is the later breeds as I

have noticed that in these later breeds, there is a difference in the coat of hair. They are not as wooly as they were in the English type spaniels.

Q. Calling your attention to the ribs of the two dogs, what do you say there? A. Well, the ribs on the pottery dog are more flat and they are more rounding like a sprung rib on the plaster dog.

Q. Now, the ceramic Woolworth—it is ceramic, isn't it, a ceramic statuette? A. Yes, sir.

Q. That appears to be a little smaller than the model of your dog; is that right? A. That's right.

Q. Why is that? A. All clays which are used in the ceramic field has a shrinkage when being fired through the kiln. The clay shrinks.

Q. What is your opinion as to where the dies of the mould came from that this Woolworth dog is made from? A. In my opinion—

Mr. Porter. I object, your Honor. We are asking for facts here.

Mr. Barnes. He made the dog and he found the dies. If he didn't actually bring them, he can give his opinion.

Mr. Porter. How does he know?

The Court. The testimony is that he says that he made the model from which this Woolworth dog was put on the market.

Mr. Barnes. That was when he was in Burley's.

The Court. Yes, and that the model, he doesn't know where it was. It probably was destroyed but this one is a facsimile of a mould, if I use the term properly, from which that was made.

The Witness. That's right, sir.

The Court. The question was what?
[The question is read.]

The Court. If you know that.

A. I don't know exactly. In my opinion it came from the— LaPere purchased it from Burley Pottery when Burley Pottery went out of business, as there were a number of dies and shapes which I had made for Burley are in possession of LaPere at the present time.

The Court. But you saw those at LaPere Company?

The Witness. Yes.

The Court. And your mould wasn't there, was it?

The Witness. Those—

The Court. The mould from which this dog was made wasn't there was it?

The Witness. No.

The Court. There was nothing there from which—which would indicate to you directly or indirectly they received anything from the Burley Company from which this so-called Woolworth dog was made; was there?

The Witness. Nothing but a set of dies. There was a set of dies—

The Court. What are "dies"?

The Witness. Dies are the tools which are made to produce moulds for manufacture.

Mr. Barnes. Those dies were there.

The Court. Can you tell from dies what the mould is?

The Witness. Oh, yes, you can tell from a die because the die—there was parts which will show you the sample you see here in this dog [indicating].

The Court. But they would be separate, they wouldn't be together; is that it?

The Witness. They would be separate, that is true.

Q. [Indicating] This particular exhibit here, which is Defendant's Exhibit F, where did you find that and when, as near as you can recollect? A. I would say some time in February after Mr. Sabin had contacted us about what had taken place about the law suit. Mr. Harold and I were looking for—

Q. Harold is in LaPere Pottery? A. He is owner. He says there is a model here of that dog somewhere—

The Court. No, no.

Q. Not what he told you. Did you make some search in the LaPere Pottery Company with Mr. Harold? A. That is true. That is why I made the search, looking for the dog which he told me was a model. We found this dog in a cabinet in the die room. I took the dog from the cabinet and washed it off because there was dust over it where it had been there for quite some time, how long, I don't know.

Q. When the Woolworth dog was manufactured by LaPere some time prior to the sale of these dogs in the spring of 1949, you were familiar with the manufacture then, were you not? A. Yes.

Q. You knew they were going out? A. They were making some. Where they were shipped and when, I don't know. They could be in stock there for all I know. I don't know about the shipping of dogs from LaPere, up until Sabin's shipments. I did see some part of Sabin's shipments.

Q. I just want to get straightened out in my own mind one or two facts in the sequence. The model comes first and then what comes next? A. Block mould, plaster mould.

Q. From the block mould they do what next? A. Make the dies from the plaster mould.

Q. From the dies, the plaster mould, then what? A. They make moulds for production.

Q. Those moulds for production and those dies are what you are referring to when you were with the Burley Company in 1938 when you say they were shipped out; is that right? A. That is right. There was a number of moulds there.

Q. Are they the moulds that were there in the LaPere Pottery Company when they were making this Woolworth

dog? A. I don't know whether or not it was the same moulds they had started with but I do know they had dies there for producing moulds exactly the same.

Q. There is a date on the bottom of that Exhibit F and it says "AM CO 1938". Do you know how that got on there? A. I don't know what that is or where it came from.

Q. Do you know what the "AM" stands for? A. No, sir.

Mr. Barnes. That's all.

The Court. Would that "AM", Mr. Witness, indicate to you that would come from the Burley Company?

The Witness. That can be. I never put anything on the bottom.

The Court. It would indicate that, wouldn't it? You call that a mould?

The Witness. It is.

The Court. Is that one you made?

The Witness. No, sir.

The Court. That is marked "AM CO 1938".

The Witness. That's right.

The Court. The "AM CO" wasn't the Burley Company?

The Witness. No, sir.

Q. You don't know what that is, do you? A. No, sir.

Q. This model was made up in the Burley Company and the LaPere Pottery Company from the dies and moulds they had? A. That model could have been made from a mould which was purchased from the Burley Company but so many different people buying—go out and buy a model and take it in somewheres and have it made up.

Q. Did you ever hear of any AM Company? A. No, sir.

Q. "Amco", it might be? A. There is a type of material on the market called "Amco" that is used for potteries quite a bit but they surely wouldn't use a dog.

Q. When you found that in the cabinet was that the condition it was in and that mark was on it? A. The mark was on it and there was dust where it had been laying for some time in the cabinet.

Q. And weren't many items—how many items in the cabinet? A. I suspect between 2,000 and 3,000 items in there in that cabinet. There is almost every animal represented in there from I believe every country in the world that has been brought in by jobbers, shipped in by many people. There's about ten people a day, I expect is the average, come in there and want to have something made. They bring in items from all over the world. So many items are left there, I just put them in the cabinet. That has been the habit of the foremen of the mould room before I took the job.

The Court. When did you notice this mould?

The Witness. It was some time in January, I judge.

The Court. When you saw it, did you recognize it immediately as a copy of a mould you had made?

The Witness. Yes, sir.

The Court. Did you go to any member of the firm and tell them about it?

The Witness. Otto Harold. He was with me at the time.

The Court. As a result of any talk you had with him, you received no information whatsoever, did you?

The Witness. No, sir.

The Court. So far as you know this so-called Woolworth dog has been made from that mould; is that right?

The Witness. That is true, yes, sir.

The Court. The fact that the legs were broken would indicate the reason why that might be so; is that it?

The Witness. That is true.

Cross Examination by Mr. Porter.

XQ. Mr. Moyer, I understand you are the foreman in charge of moulding for the LaPere Pottery Company in Zanesville? A. Yes, sir.

XQ. And the LaPere Pottery Company is the company that made this Woolworth dog which is complained of in the infringement, in this suit? A. Yes, sir.

XQ. Now, you don't call yourself a sculptor? A. No, sir.

XQ. You are just a pottery man? A. I am a pottery man.

XQ. Is there a difference between sculpturing and pottery making? A. A pottery man is a man who generally learns ceramics from various ways of learning. One is from growing up with it and the other is going to school. A sculptor is a trained artist which is trained for sculpturing purposes.

XQ. And you don't do any sculpturing as such? A. Oh, yes.

XQ. And those are those things which you enumerated? A. That is right.

XQ. Which means preparing moulds for pottery manufacture? A. I make the moulds, prepare them for manufacture. Often I make the mould from the models and make the dies. I have made many moulds from those dies.

XQ. Let me briefly review your story about your original dog in 1938. What do you say about that? What is he made out of? A. You mean the original model which I made?

XQ. Yes, sir. A. I made that model out of plaster, carved out of plaster, in 1938 and it was turned over to Burley Company to produce and sell on the market.

XQ. Did your original model have any "AM CO 1938" on the bottom of it? A. No, sir. The only marks I ever use on any of my merchandise, I write the name "Moyer"

and put the "C" with a circle on it. That is in case of copyright.

XQ. How many models of that dog did you make in 1938? A. One.

XQ. Did the Burley Company ever make any dogs from your model? A. Yes.

XQ. And sold them? A. Sold them.

XQ. Commercially? A. Yes, sir.

XQ. Tell us again what was your model or basis for making your 1938 model of your dog? A. There was a fellow brought a dog in there to me which was a great wooly dog. He would sit there for several weeks, probably.

XQ. Wait a minute. The dog didn't sit somewhere for several weeks? A. A great wooly dog.

The Court. A what?

Mr. Porter. A large dog.

The Witness. Oh, no. The model—

XQ. I am trying to find out what was the model you used for making your 1938 model? A. That is what I started explaining, sir. The 1938 model was made from a plaster dog that someone brought there and sat in the shop for a long time. It was a great wooly dog, wooly all over. On the sides here [indicating] the hair had been cut in there with a tool and did not look like a dog by any means. One day I set down; I took that dog and carved it out, carved out a dog like this from the one that set there.

XQ. What did you use for your model— A. Because I had a cocker spaniel of my own which was given to me as a present one time and—

XQ. By whom? A. By Davis Kennels over in Ohio.

XQ. Is this dog still alive? A. Oh, no. He could be—I don't hardly think he is but someone stole him and he was about six years old when they stole him.

XQ. When was that? A. They stole him in about 1941 or 1942.

XQ. All right. How did you modify this original wooly dog model you are telling us about? A. I took on my spare time from other work, I sat down and kept a carving this dog out to look like my own dog.

XQ. To look like your own dog? A. That's right.

XQ. What did you do to prepare your own dog to act as your model? A. I used to stand him on a porch and I would step down on the ground and talk to him and have one of the children and I would look at him to get an idea of what I was doing.

XQ. Was he a show dog? A. No, he came from very good stock.

XQ. Did you ever show him in any dog show? A. No, sir.

XQ. Was it your custom to have him plucked and trimmed ever? A. No, sir.

XQ. You made that plaster model in 1938 and then I understand you to say the Burley Company made and sold dogs like it? A. That's right.

XQ. And that original dog of yours you never copyrighted? A. No, sir.

XQ. Bore no copyright notice? A. No, sir.

XQ. What kind of a cocker was your own, live dog you used as a model? A. It was termed then what they called the English style cocker.

XQ. Was he an English cocker spaniel? A. It was called English style cocker. I don't know whether he came from England or what. I don't know the history of cockers that well. The only thing I know, he came from Davis Kennels.

XQ. What makes you think he was an English cocker? A. That was what I was told at the time I received him from Mr. Davis.

XQ. And then the dogs, you say the Burley Company made dogs, are they plaster or ceramic? A. Ceramic models.

XQ. All ceramics in 1938? A. Yes, sir.

XQ. Now, at some time apparently you say Burley Company folded up in 1938? A. Yes, sir.

XQ. And you had a job with Weller Pottery Company after that, the Shawnee Company then, and then you turned up at the LaPere Pottery Company in 1945? A. Yes, sir.

XQ. You personally didn't bring any moulds or models over to the LaPere Company from the Burley Company? A. No, sir.

The Court. That was your mould, wasn't it?

The Witness. The original was mine.

The Court. You told us you did it in your spare time?

The Witness. That's right.

The Court. Why didn't you take it with you when you separated yourself from the Burley Company?

The Witness. The reason why I did not take it; there was some trouble came up over the insurance. Rather than involve myself into something that was mixed up, I walked away and left the dog because they had this insurance company and the Burleys had been in court several times and the merchandise wasn't sold was involved in some manner.

The Court. This was your own mould?

The Witness. That is right.

The Court. And they had promised to give you a royalty?

The Witness. That's right.

The Court. And it was your own, personal property?

The Witness. That's right.

The Court. And you didn't take it?

The Witness. No, sir.

XQ. When did the LaPere Company first make the so-called Woolworth model dog like Plaintiff's Exhibit No. 2?

A. They were making a few of those dogs in 1945 when I went there and before that, I don't know.

XQ. Did you tell them that was your model dog? A. I did one day. I told Otto Harold, I says, that is the same dog which I modeled at the Burley Company and let Mr. Burley use.

XQ. And that dog which the LaPere Company sold in 1945, was that of ceramics or plaster? A. Ceramics.

XQ. Did it bear any notice of copyright? A. No, sir.

XQ. You say it is identical with Plaintiff's Exhibit No. 2? A. Yes, sir.

XQ. Sometime in 1950 you took out a copyright on a dog? A. Yes, sir.

XQ. What dog was that? A. That was this ceramic dog made by LaPere.

XQ. And is that Plaintiff's Exhibit No. 2? A. That's right.

XQ. And how did you get that copyright? What did you do? A. I took a copyright blank and filled the blank out and made up two units, two dogs like this [indicating], and sent to the Copyright Office with the described on here, "Moyer" and you see a "C" and ring around it. This is a dog that came from Woolworth's.

XQ. And that "Moyer" with a "C" on it was your copyright notice? A. That was the notice on the piece of merchandise of the copyright.

XQ. That you sent in as embodying your copyright? A. Yes, sir.

XQ. And then you told the Copyright Office the date it was first placed on sale, sold or publicly distributed, was February 11, 1950; is that correct? A. Under copyright. There was also a note that went with this that this copyrighted item—this item is copyrighted at this date—this is the first time placed on sale because this had not been copyrighted before, I explained—

XQ. Who did you explain to? A. I put a note in with the copyright blank.

XQ. What did you tell them? A. The exact words I can't tell you but I do know that the note described that

of the date of publication that this dog with the copyright on it—

XQ. With the copyright notice on it? A. With the copyright notice on it, yes, sir.

XQ. But you neglected to tell the Copyright Office that the same dog had been sold publicly since 1945 by LaPere Pottery Company? A. I didn't know it would be necessary for me to tell them that.

The Court. Just answer the question yes or no.

The Witness. No.

The Court. That was copyrighted after you knew about this suit?

The Witness. That is right.

XQ. You don't pretend to be a dog expert? A. No, sir.

XQ. You are not familiar with the points of cocker spaniels? A. Not cocker spaniels. I raise beagles.

XQ. Then I understand that in—at some time in 1949 you learned from Mr. Sabin the dog which LaPere Pottery Company was putting out and sold to Sabin and he in turn to Woolworth was charged to be an infringement of a copyright; is that right? A. That is right.

XQ. And then what did you do about looking out—about this plaster model, gray plaster model which is Exhibit F? A. I made the statement that it would be almost impossible because the dog—I had originally made the dog myself at the Burley plant.

The Court. What did you do is the question, not what statement you made. What did you do in connection with it? That answer may be stricken out.

The Witness. I can't answer that I did anything. I don't recollect of doing anything at the time of notice.

The Court. I suppose you registered that copy with Mr. LaPere in Washington?

The Witness. How is that, sir?

The Court. You registered the dog in the Copyright Office as a result of some talk you had with your employer?

The Witness. That's right. He gave me permission to do so—

The Court. No, you answered my question.

XQ. If I understand correctly, there were no markings such as "AM CO 1938" on your original model dog?

A. No, sir.

XQ. What was it you told Mr. Sabin when he told you that this Woolworth dog was charged with being an infringement of copyright? A. I told him it was almost impossible because I had made the model for this dog myself. I knew different and Mr. Sabin at the time didn't know I knew that.

XQ. When did he know that? A. He didn't know that until I had explained to him at the time he contacted me about the law suit.

XQ. When was it you explained that to him? A. It was last fall some time. I couldn't recall the time.

XQ. But you said you looked up this model of a dog in February of 1949; you found that in your locker? A. That is right.

XQ. What started you looking for it in February? A. Because he came to me last fall, Mr. Sabin did, and asked me to check up on it to find out what I could about it because there was a law suit of infringement. He asked me to make a check on it.

XQ. You said you found it in February, 1949.

Mr. Barnes. You mean 1950.

The Witness. 1950.

Mr. Porter. Excuse me.

The Court. You said you saw it in the cabinet, didn't you, of LaPere Company back in 1945?

The Witness. No, sir.

The Court. When did you see it?

The Witness. I never saw this model here until we found it in February in 1950.

The Court. Never saw it before?

The Witness. This one—[indicating] this one particular model, no, sir.

Mr. Porter. Referring to Exhibit F.

The Court. That is—

Mr. Porter. The gray plaster model.

The Court. The one with the initials underneath, isn't it?

Mr. Porter. That's all.

Re-direct Examination by Mr. Barnes.

RDQ. As I understand your testimony now from the question from his Honor, this model—

The Court. Would you mind, Mr. Barnes, if you would identify it so that Mr. Penney can have it, referring to the number of the exhibit?

RDQ. This model, Exhibit F, that is what you were referring to when you told the Court that was found in 1950 by you before the copyright patent: is that right? You found that in February—January you applied for a copyright? A. That's right.

RDQ. But the dies from which the Woolworth dog were made, you said in your opinion were from the Burley Company. When did you first see those dies? A. In 1945.

RDQ. When you first came there those dies were there then? A. Yes, sir.

RDQ. Were some of these dogs made up during that period from 1945 to 1949? A. There has been, yes, sir.

RDQ. Do you recognize those dies there as the dies for the Woolworth dogs? A. What's that?

RDQ. As the dies that the Woolworth dogs were made up from, are those the dies this dog was made up from in 1945 when you first went to work for them? A. This dog made is the one I recognized there.

RDQ. In 1945? A. In 1945, yes, sir.

Re-cross Examination by Mr. Porter.

RXQ. But I understand you to say you hadn't seen your original plaster model which you say you made in 1938 from the time you left the Burley Company in that year; is that right? A. That is right.

RXQ. Then in 1945, a gap of seven years, you say the next you saw was this ceramic model, Plaintiff's Exhibit 2, being made by the LaPere Pottery Company; is that correct? A. That is right.

The Court. I suppose you got a royalty from your own matters, the result of your own handiwork; is that right?

The Witness. I get a royalty—

The Court. From what you turn out yourself?

The Witness. That's right.

The Court. And these dies you say you saw in 1945, you recognized them immediately?

The Witness. That is right.

The Court. As dies which were used in turning out your dog?

The Witness. Yes, sir.

RXQ. And from 1945 down to the present time still that was your die and while you collected royalties for your handiwork, the LaPere Company never paid you a five cent piece for any dog that was turned out?

[No response.]

Re-direct Examination by Mr. Barnes.

RDQ. Were you paid for the work you did designing different things for LaPere Company? A. I have done much designing there and everything has been paid for but this dog which I did not design for them and was never paid for by anybody.

Mr. Barnes. That's all.

Mr. Potter. No more.

The Court. Is that all, gentlemen? Are you finished with the witness?

Mr. Barnes. Yes, your Honor.

CAROLINE F. BIGGS, sworn.

Direct Examination by Mr. Barnes.

Q. What is your name? A. Mrs. Caroline F. Biggs.

Q. Where do you live, Mrs. Biggs? A. In Dedham, Massachusetts.

Q. And are you interested as a dog fancier? A. Very much.

Q. And do you have a kennel of your own? A. Yes.

Q. And what dogs do you specialize in? A. Cocker spaniels, exclusively.

Q. And how long have you been interested as a fancier? A. Just about ten years.

Q. Have you had dogs in the different shows? A. Oh, yes, we have eight champions that carry our name, two international champions and one Cuban champion.

Q. And how many dogs do you have in your kennel? A. About 20.

Q. As far as these cocker spaniel dogs go, is it rather difficult to distinguish or tell them apart at times? A. Not for me, it isn't.

Q. Not for you? A. No.

Q. But for the ordinary person, what would you say? A. Well, I think it is very difficult for the ordinary person to tell them apart.

Q. You have exhibited dogs in a lot of different dog shows? A. Oh, yes, all over the United States with the exception of the West Coast—I shouldn't say that because my international champion I sold is now being exhibited on the West Coast and is winning out there at the present time.

Q. This magazine, *Dog's World*, of April, 1950, has that got some material with reference to you? A. Yes, it has quite a bit. It has, of course our paid ad of our red cocker who is the greatest producing Ascob cocker in 1949.

Mr. Porter. Your Honor, I would object to this testimony as irrelevant to any issue in this case.

Mr. Barnes. I am trying to qualify her as a dog expert, your Honor.

The Court. Do you question her qualifications as a dog fancier?

Mr. Porter. I will let Mr. Barnes bring out what they are. I haven't personally had the pleasure of meeting the lady before.

A. [Continued] And an article I wrote on my return from Cuba this winter on cocker dogs just recently doing some winning.

Q. We have heard some testimony here to the effect that the styles change in this cocker spaniel breed. Is that so, in your opinion? A. Yes, they do. They change quite rapidly, really. That is why it is necessary to go all over the different parts of the country to see the types that are winning at the present time.

Q. Would you say that the Woolworth dog, as contrasted with the other dog—you have examined them both, have you? A. Yes, I have.

Q. Would you say there is any difference in the style or the change in styles between those two? A. Yes, I would say this is an old fashioned type [indicating].

Mr. Porter. If your Honor please, I think this lady is being put on apparently as an expert on copyright and—

Mr. Barnes. An expert on dogs, your Honor, and the testimony here from the plaintiff was that the dogs have changed during the years and that from 1930 on they had shorter legs and then the legs got

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longer and so forth. That is what I want to bring out.

The Court. You have never had any experience, have you, sculpturing dogs?

The Witness. Never had any experience sculpturing dogs.

The Court. Never did?

The Witness. No.

Mr. Barnes. I do not offer her as a sculpture expert, your Honor, but as a dog expert.

The Court. Well, the testimony is that there is a distinct line or specialty in connection with the sculpturing of dogs that carries with it not only the knowledge of sculpture. The last witness said his father before him had been in the business and he had done it in his odd times and had made arrangements with his employer to do it and Mrs. Biggs has raised all sorts of dogs—

The Witness. Just cockers.

The Court. She has had eight cocker spaniels that have won prizes—

The Witness. Champions, not won prizes.

The Court. I didn't discount their value for a minute.

Two of them international champions.

The Witness. Yes, and one Cuban champion.

The Court. And—

The Witness. There is a difference in type.

The Court. Have you ever been a judge?

The Witness. I do not wish to judge, no, but I am consulted by many judges. I do not wish to judge.

The Court. Does your husband judge?

The Witness. Yes.

Mr. Barnes. As a practitioner, not a judge, your Honor.

The Court. I suppose—how long have you been married?

The Witness. A good many years; I will have to try and think.

The Court. Any children?

The Witness. Yes, I have a married daughter so I have been married about 26 years.

The Court. You have been more or less—you have been a real homebody and a mother; isn't that right?

The Witness. Combined with the dogs.

The Court. Is that your sideline, the dogs, or your husband's business?

The Witness. No, my husband is with the telephone company but I now have the time to devote to the dogs and so that I have traveled all around the United States and as I say to Cuba this winter, looking at the different types of dogs, and there is a distinct type.

The Court. That is, you feel you are what you would call a dog fancier; is that the term?

The Witness. Definitely, oh, yes. I feel that I do know cocker spaniels thoroughly.

The Court. But you have never known them as in the field of artistry, have you?

The Witness. No, but I am at present asked to consult—I am at present, I have been asked to consult with the Merry Minx Studios in Taunton on a new production they are putting out as to my opinion which model is the better.

The Court. That is, they asked you, in their research work, about the peculiarities—

The Witness. Of the cocker and they have asked me which model they are putting out I think is the better. In other words, I am definitely consulted by different people in different parts of the country.

The Court. Which do you think is the best portrayal, clay or ceramic, whatever you might call it, what you consider to be a reproduction of a show dog? That's right, isn't it? They call these prize dogs "show dog"?

The Witness. Yes. Which of these two [indicating]?

The Court. You call them "prize dogs"?

The Witness. No, show dogs. There is a difference.

The Court. [Indicating] What do you call this?

The Witness. I just call this a very ordinary thing.

The Court. Would you call it a show dog?

The Witness. No, I really wouldn't. I would call this [indicating] a show dog.

The Court. You realize it was said there is no difference between this and this [indicating]?

The Witness. But there is, in my opinion. [Indicating] We haven't bred them with a coat like this for years.

The Court. I think you are qualified. I only wanted to ask questions to satisfy myself that you know a cocker spaniel.

The Witness. I do.

Q. You are satisfied there is a distinction? A. Oh, yes, because [indicating] this is more of an old fashioned type. You get the feeling the minute you look at it.

Q. And the styles— A. —have definitely changed and this is definitely our later style and the newest style [indicating]. This is something that a person breeding dogs would buy. This is something that a person would buy to set on their child's desk.

Q. This is— A. —[indicating] This you buy for setting on your child's desk and you wouldn't care if it is broken or not. This is something you would give for a prize at a dog show. There is no comparison between the two, in my opinion.

Q. It was testified here by the plaintiff that the market for the plaintiff's dog, Exhibit 5, and these other dogs of the Contemporary Arts were mostly for dog fanciers and dog lovers. A. Yes, this would be sold to those people [indicating].

Q. In your opinion is there anything about the Woolworth dog that would appeal to that market? A. No, I wouldn't pay ten cents for the Woolworth dog. I don't know how much they sold them for.

Q. Do you think any dog fancier would be interested?

A. No, because it is too old fashioned. It isn't the type they are breeding now. [Indicating] This you would buy to give for a prize in a dog show.

Q. It is an entirely different type of dog, in your opinion? A. Yes, it definitely is.

Q. Will you kindly point out to the Court, taking the Woolworth exhibit No. 2 and the Woolworth—and the Contemporary Arts Exhibit No. 5 and taking those two [indicating] this one and this one, point out to the Court some marks of difference between the two that occur to you? A. There is a definite difference, of course, in the way the ears are put together and this has a feeling of real color [indicating].

The Court. For the record, would you mind having Mrs. Biggs, when you refer to any exhibit, identify that exhibit? She is referring to what exhibit?

The Witness. Exhibit No. 5. Exhibit 5 has a real feeling of coat to it and a real feeling—

The Court. That is Exhibit 5 for the plaintiff?

The Witness. Yes, and a real feeling of character. You can see the coat [Indicating] This looks like something in wool and there is a difference in here. This ear has a soft drop, the way a cocker's ear would have. This one here—

Q. That is the Woolworth? A. That is the Woolworth, just falls right off. [Indicating] This one has a fold and this one doesn't look like a coat of anything and this one has a coat in the back the way the coat grows on a cocker spaniel. This is something that is just put on—

The Court. I have to get it for the court reporter.

The Witness. There isn't any artistic ability, it is just put on as a coat.

Q. When you say this— A. [Indicating] This is Exhibit No. 5. It is really a work of art because it is put on

with a coat the way the coat really looks on a cocker spaniel, and this has the old fashioned look—this is the Woolworth dog and it has the old fashioned type of leg that drops right down off the front. This has the leg more on the cocker as we have developed it in the past. This one—

Q. I want you to tell— A. It is Exhibit 5. Exhibit 5 has a little shape here [indicating] to the leg in front.

Q. Show the Court. A. [Indicating] It has a little shape to the leg in front. It is definitely modeled from here in front. This is the English type of drop to the front. The English foot has a lump and puff to it here which our cockers now, today, may have drops down with the foot going around like that [illustrating]. This is just a design. This is really a work of art.

Q. Do you find any reference in the front of the ears in the Woolworth one and then take the Contemporary Arts dog, and show, if you will, please, what the difference— A. [Indicating] This has just been dropped in the ear. Just dropped right off without any sculpturing. This has been moulded and modeled so that you really have a feeling the ear does come down softly in the front.

Q. Is there any difference between the ears of the Woolworth dog and the other dog? A. [Indicating] Of course there is more throat modulation in here and this is—

Q. More throat modulation in what? A. In Exhibit 5. There is more throat modulation.

The Court. The Contemporary Arts dog has more modulation?

The Witness. Yes, under the throat, and it is wider between here [indicating]. It looks like a cocker spaniel, really.

Q. When you say "this"— A. [Indicating] This one is the Woolworth dog. While it is a spaniel, it is just a spaniel. It just isn't any work of art—

Q. I mentioned the feet of the two dogs, the Woolworth dog and the— A. [Indicating] This is more the English

type of foot. The Woolworth dog has the more English type of foot while this would be a setter foot. This has a real cocker spaniel foot; Exhibit 5 has a cocker spaniel foot.

Q. How about the tails? A. Well, they are of different material and they are so different that they are not alike.

Q. How are they different? A. [Indicating] This one is No. 5 and it has a real cocker spaniel tail. This one is—

Q. This one— A. The Woolworth one is a thinner type thing and of course it is marked differently. Exhibit 5 has the later type—Exhibit 5 has the type of tail we have on our dogs now. This is a tail like you would find on a springer—[indicating] this is a Woolworth dog.

Q. The Woolworth dog is Defendant's Exhibit 2. What do you say about the tail on Exhibit 2? A. It is a tail. On Exhibit No. 5 there is a cocker spaniel tail. [Indicating] This is just a tail. This is the sort of feet and kind of puffy on Exhibit No. 5.

The Court. Your position is that Exhibit No. 5 depicts a show dog?

The Witness. Yes.

The Court. And the Woolworth dog depicts a mongrel?

The Witness. No, it depicts a poor type, old fashioned—

The Court. Not a pedigree dog?

The Witness. Yes, but an old fashioned type of cocker spaniel.

Q. How about the hair on the respective dogs; do you make any distinction there? A. I think I explained that before, that this one—

Q. Don't say "this one" because you get me in a jam every time you do it. A. Exhibit No. 5 has a real cocker spaniel coat. Exhibit No. 2 doesn't have any coloration like a cocker spaniel.

The Court. Tell me, Mrs. Biggs, how long have you been breeding dogs?

The Witness. We have been breeding cockers for ten years but we have had them before.

The Court. [Indicating] This other one includes that time?

The Witness. Yes, it does, but you will see some people bring this old fashioned type dog into the ring today.

The Court. Probably a type of cocker spaniel that has almost become extinct?

The Witness. They have changed so. The structural change is not changed but there are many little surface changes.

Q. And the Woolworth one, did you say—that was the old type or old style and Contemporary Arts dog is a newer— A. Yes, it is a newer one, definitely.

Q. Can you say anything on an examination of the ribs on these two dogs? A. Exhibit 5 has what we like which is a suggestion to a spring of rib and this one has, again I am going to say, more the English type, lacking the spring of rib. Up until three years ago you could register your cocker in one litter—you could have one and register it as an American cocker and then another as an English cocker and now it has been changed. Now your mother has to be an American and your father has to be what they call a cocker spaniel. The other is designated as an English cocker spaniel.

Q. Whether or not it is your opinion that the Woolworth dog and the Contemporary Arts dog have so many points of difference that they are easily distinguishable; is that right? A. I would definitely say so, yes.

Q. Would you put that in your own words as to your opinion as to these dogs? A. My opinion is that they are definitely different, from different designs.

Q. And the earlier dog, did they call that a springer? A. No, English cocker.

Q. Did they have more hair on them than— A. It had a little different type hair and we have bred out this curly coat as not being desirable. If you get a puppy with this

heavy, curly coat, we eliminate that. This is the type of coat we want [indicating].

Q. Not the Woolworth coat? A. No. That flat coat. The Contemporary Arts coat with the Contemporary Arts feathering. If we have one of this type, we quickly sell it for a pet.

[Afternoon recess]

Q. Referring to the Woolworth dog, Defendant's Exhibit 2, and the Contemporary Arts dog, which is Exhibit No. 5, and you have those two before you now, haven't you? A. Yes, sir.

Q. Now, in your opinion, was the Woolworth dog copied from the Contemporary Arts dog? A. There isn't any comparison in the two dogs except they both are a type of a spaniel, a cocker spaniel. There is no—there just isn't any comparison between the two [indicating] this is so much better than this.

Q. One is so much better than the other? A. No. 5 is so much better than No. 2.

Q. That Exhibit 2, in your opinion, is or is not a copy? A. Oh, no.

Q. Your opinion is it is not a copy? A. No, in my opinion it is not a copy.

Q. And in concluding my examination, will you just tell the Court why you think the Woolworth dog is not a copy of the Contemporary Arts dog? A. It doesn't have any of the quality that the No. 5 has. No. 5 is a work of art and this is just something like you always see in Woolworths or someplace like that.

Q. With the other marks of difference that you have already pointed out, you have come to the conclusion that the Woolworth dog could not be a copy of the other dog at all? A. In my opinion it isn't a copy at all of the other dog.

Mr. Barnes. Your witness.

The Court. What are the lines of demarcation? What is the difference between an English cocker spaniel and an American?

The Witness. The English cocker spaniel has a different effect on the way the legs come right down, out in the front.

The Court. What is the difference?

The Witness. Well, it is awfully hard for me to explain to you but I think perhaps you can get the effect—

The Court. Not consulting either exhibit, just in the light of your experience dealing with cocker spaniels.

The Witness: They go in and come right down straight. They are closer together in front than we like our good cockers to be which gives you a little bit more of a spring of rib.

The Court. You mean the English cocker spaniel, the legs are nearer together?

The Witness. They are narrower through and it doesn't have the spring of rib that our American cocker has. In Exhibit 5 it has a spring of rib.

The Court. Does that follow right through the whole contour of the dog?

The Witness. Yes, it is really narrower all the way through. We like our cockers to be chubbier through. The good Americans are. The good ones.

Cross Examination by Mr. Porter.

XQ. Mrs. Biggs, have you ever had any sculpturing experience? A. No, I told the Court I never had any.

XQ. No ceramics? A. No, I told the Court I never had any ceramics experience although I have been asked to consult with a sculptor who is going to have the work put into ceramics.

XQ. And you have never had any experience in the making of ceramic models? A. Oh, no, I have never had any experience in that.

XQ. Now, your Honor just asked you about the difference between the English cocker spaniel and the American cocker spaniel. Could you make that a little more clear to me? A. I don't know whether I can make it too clear because you are not in my class when it comes to that. You may know ceramics but you don't know the finer points. If I trotted two up to you, you might not know the difference. It is rather hard to put them into words. I explained to his Honor the American cocker spaniel such as Exhibit 5, the spring of rib that we have and the chunkier figure and the legs have more fullness in through here [indicating]. The English drops off and schooches back.

XQ. Do you call one of these dogs English type? A. [Indicating] This one is more—this is No. 2 and it is more on the English type.

XQ. And that is the Woolworth dog? A. Is Exhibit 2.

XQ. And Plaintiff's Exhibit 5 is what? A. Is the American type.

XQ. And the Woolworth dog is noticeably smaller than the American dog, which is Plaintiff's Exhibit No. 5? A. It is noticeably shallower without the spring of rib.

XQ. And smaller all around? A. Yes.

XQ. As a matter of ceramics, you wouldn't know the difference between the dog, Plaintiff's Exhibit No. 5, and the Woolworth dog, Plaintiff's Exhibit No. 2? A. No, I am no expert in ceramics.

XQ. I understand that you have owned professional show dogs? A. That isn't the word for this. You are out of your element in this.

XQ. You say it your way. A. We have eight champions that carry our name. Two of them are international champions and one is Cuban champion.

XQ. Do you show your own dogs yourself? A. I hire professional handlers. Occasionally I show them myself but is it not possible for me to get to all parts of the United States and I like my dogs shown and winning in all parts of the United States.

XQ. Look at the gray plaster dog, Defendant's Exhibit F, and tell us what that is, English or American type? A. [Indicating] I say this and this are the same.

XQ. You are referring to the gray plaster and the Woolworth model? A. Yes, I say they are both old fashion type and border more on the English.

XQ. Compare, if you please, the gray plaster model, Defendant's Exhibit F, and the white plaster model which is Plaintiff's Exhibit No. 11? A. [Indicating] Is this the one from which the copyright is—is this the one from which the copyright has been taken? A. This is the only one presented today—

XQ. I want to eliminate the color. A. —which is in the Copyright Office.

XQ. That is Plaintiff's Exhibit No. 11 is the same as the model, Plaintiff's Exhibit 5? A. You are telling me now but I am not sure, am I?

XQ. You asked me and I am telling you. A. I say you told me. [Indicating] This is the one I think we are using. This is the one that was sold in Woolworth's and this is Exhibit 5. Is there any necessity for my going into them in the rough?

XQ. If you want to, let's compare— A. I think this is—

XQ. I am not concerned about the Woolworth—

The Court. Counsel is entitled to have answers.

XQ. I would like to have you compare differences between Plaintiff's Exhibit 5 and the gray plaster model, Exhibit F. A. There is the same difference as there is in the other two because you can see definitely the difference in the feet. There is no question. Those are the feet of the English setter as well as the cocker spaniel.

XQ. Go straight down? A. No, that is where you are wrong. [Indicating] You have this fullness on this lift to the foot which you get on the English cocker and in the setter which we do not get in this, in No. 5. This is the type we have. It is let down and soft around here, just

as soft as can be. The other is built up and has a little build like these here. This one here could be a setter foot, No. 2 and No.—what was that—F? F could be a setter foot just as these two could be setter heads or the English type cocker heads. There isn't that same feeling you get in this, that this is the head of the American cocker spaniel.

XQ. Look closely at them for size? A. Size doesn't enter into it, does it?

XQ. I will ask you to compare the size. A. Why does the size matter? You can make them in any size you wish.

The Court. I think you ought to answer that question. Compare them as to size.

The Witness. They stand at the same height.

XQ. [Demonstrating] When I put the pencil over the middle of the back and again when I put it on the nose of the dog— A. There is a difference, you see.

XQ. You are referring to— A. No. 5 is slightly lower.

XQ. And then I put the pencil on the tail. A. That looks about even from here. You have to put a level on it.

XQ. You notice, of course, the legs on the gray plaster model are broken? A. Yes.

XQ. Then I would like you to look at the sides, between the ribs. A. You still have the same thing. You still have the spring of rib in here [indicating] that you don't get the effect of in here. In No. 5, as I say, in the cocker spaniel we have that effect of the spring of rib which was put in here and here, in No. 2 you have more or less the slap-sided effect that you have in this one. It has just a little spring but not the real effect. This has the effect—

Mr. Barnes. Wait a minute—

A. [Continued] No. 5 has the effect of being sprung in here.

The Court. [Indicating] Put this one over here.

The Witness. You see the difference there?

The Court. What is the difference, now?

The Witness. [Indicating] This definitely has the spring of rib here. Can you see it? Gee, I can. Those are the little things—

The Court. I am here to listen to the questions and answers.

The Witness. That is what makes one look like a cocker spaniel and the other look like the English type or it could be almost a setter.

The Court. Put the pencil over the back of those now. There isn't any difference in those two, is there?

The Witness. I don't know.

The Court. They look differently when you put them in different positions?

The Witness. No. [Indicating] Is this sloped a little? You can't tell unless you have a level but it doesn't change the spring of rib which makes a cocker essentially a cocker and the other more or less—No. 5, the real cocker, and this could be either the setter type or the English effect.

The Court. Suppose you made a model—

The Witness. This would be—

The Court. Wait a minute. Suppose you made a model out of the so-called—out of Defendant's Exhibit F or suppose you took some sort of substance and smoothed that down so that it was just the same as this [indicating], would there be a difference?

The Witness. Yes, there really would be because you get the difference, still get the difference in the effect of the spring of rib.

The Court. Did you hear this other young lady testify this morning that if this was rubbed down, it would be the same as the other?

The Witness. I don't think I noticed her testimony in that respect but I would say to your question you would

still have the same feeling that Exhibit 5 has the spring of rib and the feeling of a cocker spaniel that this [indicating] does not have.

Mr. Barnes. F.

The Witness. F is a dog and you see the definite difference. You see the difference in feet—I don't know which one you want to use it in but you can see definitely the difference in the feet [indicating]. This has the setterish type of foot, or the type—

The Court. When you say this?

The Witness. No. 2, and No. 5 has the cocker spaniel look. [Indicating] The modeling is so much better in this. This is really modeled. If you put a little hole in the back, it would be typically Woolworth, if you put a flower or cactus or something in it.

XQ. Look at our Jan Allen dog, Plaintiff's Exhibit 5, and would you say that dog had been trimmed for show? A. Well, some of them don't need any trim for showing.

XQ. Would you say that dog has been? A. I can't tell. It might have been born with a clean cut skull like that. Some of them are and some of them aren't.

XQ. Do you trim dogs for shows? A. Some of them need it and some of them don't.

XQ. Is that true during the life of the dog? A. Yes, that is true during the life of the dog. Some of them need a touch up and some of them, you can take a few hairs off the top and they are as clean as a whistle.

XQ. Look at Defendant's Exhibit F. Would you say that dog was trimmed for showing? A. [Indicating] I would say it was the same as this.

XQ. Exhibit 5 and Exhibit F are the same? A. Yes, some of them grow a topknot and some of them don't. Some of them scarcely need anything done.

The Court. You mean the head?

The Witness. Yes, some of them grow terrific top-knots,—

The Court. I am not interested in those two.

The Witness. He is talking about whether they look like—whether they look like they are being trimmed for show. He is talking about whether I think this one was trimmed for show [indicating]. She hasn't brought out the whole detail in the coat and when you brush them down, some of them need to be trimmed and given a lot of trimming. There again I am going to say the old fashioned type do not have as much on top of the head and they were flat on the head and didn't have as much work done.

XQ. What kind of dogs have you? A. I have black, I have red and I have buff.

XQ. Tell us, which of those dogs need more trimming?

A. It all depends on the individual dog and you can get one out of a litter that requires a great deal and you can get one that you practically do none on.

XQ. And the black-haired dogs usually require trimming? A. No, no more than the red. It depends, again, on the individual dog.

XQ. You wouldn't say they require any more trimming?

A. No. Some of the buff grow tremendous heads and ears and the others don't. It is the individual dog.

XQ. Where is the trimming done for a dog that needs trimming? A. [Indicating] Off here on the sides of the ears and a little on the top.

XQ. And where else? A. You take a duplex dresser and thin off a little bit here and there. You wouldn't have it look like that F.

Q. You are referring to the hairline? A. If we have anything nowadays that comes with hair like that we sell it for a pet because we are trying to eliminate it. [Indicating] This is the kind of coat we want.

XQ. Do you trim around under the chest? A. No, it all depends on the individual dog. I trim all of mine—on a very heavy coated one you might thin it out a little bit. It all depends on the individual dog. That is the same as how a man cuts his hair.

XQ. The Woolworth dog, Exhibit 2, has that been trimmed? A. How can I tell? I say some of them are born with a clean cut skull. Never have to have any trimming. [Indicating] That has certainly not had any trimming done on the neck although we do it now.

XQ. Why do you say that; is that because you see hairline markings on the neck? A. No, on this type of thing you thin it down and then you take it off with a Duplex dresser.

XQ. What is that? A. It is a Duplex dresser you take it off with.

XQ. A razor? A. I am not a lawyer—

XQ. I am not trying to fool you. I am just trying to learn something. A. It is put out by Duplex especially for dogs. It has a Duplex razor in it. Different people trim them differently. The way one person would do it is just like one barber doing it one way—

The Court. [Indicating] Looking at this model, why do you say it hasn't been trimmed?

The Witness. [Indicating] You take all that off.

The Court. What's all?

The Witness. [Indicating] That is curly hair. If you had one that had a coat like this you would sell it right away fast because this is the type of coat that we are looking for today on No. 5 with the feathering and flat coat on the back. It has hair but it hasn't this curly type hair. This is the old fashioned type that we don't get now.

XQ. Would you agree this hair on the Woolworth dog, Plaintiff's Exhibit 2 is definitely a poor type of a cocker model? A. I would say it is a poor type of spaniel.

XQ. Cocker spaniel? A. No, I won't say that. I honestly can't. It might be English. I will say it is a poor type spaniel.

XQ. You can't distinguish between the types, looking at the Woolworth dog? A. This is so poor, no.

Mr. Porter. No more.

Re-direct Examination by Mr. Barnes.

RDQ. Does Exhibit 5 on the coat, on that exhibit, there is hair? A. It is a different type hair. It is a different type coat. You could make—you see, she has given it the effect of the coat here [indicating]. You can see by the effect she has given it here that she has given the effect of a coat.

RDQ. And that is the type of coat that is in style in the dog shows now? A. That's right.

RDQ. Now, the coat on the Woolworth exhibit No. 2 is entirely different? A. Definitely.

RDQ. And that is the kind of dog that you would want to get rid of if it had that sort of coat? A. Yes.

RDQ. How would you describe that sort of coat? A. That is the curly sort of dense coat and the minute it gets wet, it curls right up.

RDQ. Would it do any good to clip it? A. Well, you could thin it out and flatten it out and the first thing, it got wet, it would curl right up.

RDQ. And do they call them whorls? A. Sort of curls.

RDQ. It goes into those curls when it grows out and that is not the dog you want at all? A. No.

RDQ. But if the hair has grown on this dog, that is what you are breeding for today? A. Yes.

RDQ. And that is entirely different from the Woolworth breed of hair? A. We have bred this out, or hope we have. You get it sometimes and when you do, you get rid of it. One is a throwback.

RDQ. When the Woolworth brand of hair comes out, you call it a throwback? A. That's right.

RDQ. And you are trying to get rid of it and get the show type? A. Yes.

RDQ. And the Jan Allen is the show type of dog? A. Yes.

RDQ. No comparison between the two? A. I wouldn't say there was.

The Court. As I understand your testimony now, I only ask you these questions for clarification purposes—as you look at this dog, referring to Plaintiff's Exhibit 5, which the testimony shows was designed some time back in the 1940's, you regard that as a very fine—

The Witness. It is a very fine thing. I wouldn't say it couldn't be improved on but it is a very fine portrayal of a cocker spaniel dog.

The Court. Yes, and the person who designed that, from your examination of that same exhibit, was a person who knew cocker spaniels?

The Witness. Who knew what—?

The Court. Who knew how to design them?

The Witness. Yes, I would say so.

RDQ. Would you say the person who designed the Woolworth dog knew how? A. It is just one of those things you would pick up anywhere.

The Court. The person who would design a dog like that would have to know something about cocker spaniel dogs, and by that I mean the plaintiff's exhibit.

The Witness. Yes, because it is nice.

RDQ. And the person who designed the Woolworth dog— A. Didn't work very hard.

The Court. You know Miss Allen?

The Witness. Yes, and her work is very lovely.

The Court. And she is a lady who understands thoroughly the background and history of cocker spaniels?

The Witness. I won't say—

The Court. Did you know she was a dog fancier?

The Witness. Yes, but I won't say how thoroughly she knows the background.

The Court. And you knew she was a fine artist?

The Witness. I know she is a fine artist. I will qualify her as an artist, and one artist's conception and another's is different.

The Court. You are not an artist?

The Witness. No.

Mr. Barnes. That is the defendant's case, your Honor.

The Witness. Am I all through?

The Court. Yes, you are.

Mr. Porter. I will have a very short rebuttal, sir.

The Court. Do you think your rebuttal will take long? I am not going to limit you on cross-examination. If it will consume half an hour or so, we had better recess until tomorrow morning. I will not have you argue tonight, anyway.

Mr. Porter. I was going to put on Mrs. Hall briefly and Mr. Press briefly, particularly to talk about the Moyer dog.

The Court. Well, in the light of that, you not knowing what the testimony is going to be, you may have some evidence in rebuttal. You don't know, do you, Mr. Barnes? That is a question you can't pass upon now so why isn't it the sensible thing to do, unless we are prepared to sit here for an hour, to recess until tomorrow morning at ten o'clock? I understand all the evidence is in with the exception of rebuttal testimony. I am not going to foreclose you if you have any other evidence. If you find it necessary, you can do it tomorrow morning.

Mr. Barnes. My brother has a little in rebuttal. I can't imagine what I would have. I don't know of anything now.

The Court. You have a right to readjust yourself tonight, Mr. Barnes. I give you the same latitude as I give Mr. Porter.

[Conference at the bench.]

The Court. I would like to have you argue tomorrow and then I would like that which would be tantamount to a finding of facts and conclusions of law. You can get your requests in shape and you will have time in which to do it. I don't tie you down to tomorrow.

[Adjourned at 4:05 P. M. to 10:30 A. M., April 28, 1950.]

Third Day

Court Room No. 5, Federal Building,
Boston, Massachusetts.

April 28, 1950.

The Court. I think I ought to say to counsel, in the light of the discussions we have had, without indicating at all it is any point of view on my part of liability, because it isn't, that it is one of the essential prerequisites of your case, Mr. Porter, and I am not going to preclude your showing any evidence of actual damage, there was some discussion of several days ago and Mr. Barnes very properly said there were several ways to prove it and it certainly couldn't be shown upon the avenue of speculation. It is quite clear at this time unless certain circumstances developed, if the Court allowed you more than statutory damages, the Court might be guilty of reversible error. I am just saying this so that you can know, as of today, whenever you get read to offer evidence of actual damage, I am willing to receive it. It can't be speculative.

Mr. Porter. Your Honor, any actual damage—

The Court. You can discuss that when you get ready to argue your case, anyway.

Mr. Porter. Your Honor was saying we wouldn't necessarily have to put evidence of that actual damage in today.

The Court. That's right. I was afraid you might get some idea from our discussions in the lobby when we were discussing several extra curricular phases of this case that I have precluded you. I want you to know now you have a right to show it. Of course, on the other hand the Woolworth Company, there has been some suggestion they made 30, 35 or 39 cents net from the sale. Let's assume they made of gross of 50 cents, for the purposes of illustration. For the purpose of minimizing damage, they would have a right to show their overhead.

Mr. Porter. Certainly.

The Court. And we would get into a situation—

Mr. Porter. Our reliance was on statutory damages, your Honor.

Mr. Barnes. I think for the purpose of the record, it ought to show Mr. Porter waives his claim on that type of damage.

Mr. Porter. I wouldn't say that was so, Mr. Barnes.

Mr. Barnes. I thought that was what you said there.

Mr. Porter. In any copyright case of this sort, your Honor, your reliance is necessarily on statutory damages because of the difficulty of proving actual damages.

The Court. That's right, but unless you show some actual damages, all you would be entitled to in decisions in this Circuit is statutory damages which means \$250.

Mr. Porter. No, it runs from \$250 to \$5000.

The Court. Unless you show some actual damage. Don't misunderstand, I am not saying there is some evidence of that. There is evidence of damage which comes from the lips of the last witness and from the lips of the other party. There was some that came from the testimony yesterday.

Mr. Porter. On that I can put Mr. Fox on.

The Court. You don't need to settle it. If you feel after you make an analysis of your case—I am going to leave it open to both of you.

Mr. Smerdon. The Woolworth Company man is her today. If Mr. Porter is going into the evidence, we would like to offer counter-evidence. Where he is from New York, if he is going forward to prove actual damages, counsel for the defendant would appreciate letting him go ahead—

The Court. I won't ask him to do it today. We will go ahead with the other evidence. I don't think you will have any voluntary petition in insolvency if a representative of the Woolworth Company is obliged to come over here again.

ELIZABETH PHILBRICK HALL, Recalled.

Direct Examination by Mr. Porter.

Q. You are Mrs. Glenn Hall who has already testified in this case? A. Yes, sir.

Mr. Smerdon. Come up for a minute.

[Discussion at the bench]

Q. You were here yesterday when Mr. Moyer produced this gray plaster model, Defendant's Exhibit F? A. Yes.

Q. And you heard his testimony. Will you please look at that gray plaster model very carefully?

The Court. Would you mind, Mr. Porter, identifying that so that Mr. Penney will have it, by exhibit number.

Q. The gray plaster model, Defendant's Exhibit F, and compare it with the model of your own dog, Plaintiff's Exhibit 5. A. I understand that this was given as the model for this piece [indicating]!

The Court. That's right.

Q. Yes, from which the Woolworth dog, Plaintiff's Exhibit 2, was cast in ceramics. A. Yes, [indicating] and that is the model for that and that is the model for that. Now, I would like to state first by explaining and showing the change that is made in both of these dogs to produce this, the necessary changes for casting.

Q. You mean from plaster to ceramics? A. Changes that would be necessary on a plaster model unless it was a model directly made originally for ceramics. Those changes would be embodied in the original. It is done with a varying degree of skill or care for the original model. In this piece here [indicating] which is the original for this—

Q. And you are referring here to the white plaster model?

The Court. When you say "this piece here" so that the record will indicate, please give the exhibit number.

The Witness. Shall I speak of the Woolworth original and Contemporary original?

Q. [Indicating] You can call that the Moyer model.
A. It goes against my grain.

Mr. Smerdon. May that go off the record?

The Court. I think we will refer to it the way she wants it as a Woolworth model and the Contemporary; that's all right. I don't mean that—I mean when you refer to some part of this model, look at it and identify it so that the court reporter will know what part you are referring to.

The Witness. What I wish to point out is that there are certain places on any model that an artist often has

to take to the caster and have him say "that won't cast, that wouldn't pull away and you would have to cut that off" and most casters would like to have you have a rubber ball so that nothing would pull out. They are completely technical minded.

The Court. What do you mean by "casters"?

The Witness. Someone who produces these [indicating].

The Court. Not an artist?

The Witness. No, the technical man, the craftsman who produces these. In this case, as you can see, on the original of the Contemporary model—

Q. Plaintiff's Exhibit No. 11. A. You can see that the hair on the rear quarters, the feathering, hangs down in back. It is really an undercut. That had to be cut away in both of these models, in both the Contemporary original and in the Woolworth original, and you can see to what degree it is our cut away. It gave the model a great deal more beauty. In the Contemporary model it was done by an artist with regard to the model but at the same time there is a certain amount of carving away on the feathering. [Indicating] It is done more here.

The Court. What do you mean by "feathering"?

The Witness. The long hair that hangs down. It is indicated on the Contemporary model by form; it is indicated on the other one by form plus grooves, on the Woolworth model. In the front it can more easily be seen by looking underneath. You can see the difference in the sides of the feet of the two dogs. [Indicating] This one has not been changed for the casting.

Q. Referring— A. To the Contemporary original. It had to be changed for the Contemporary ceramic model. [Indicating] Suppose I show you on these two models which are the Contemporary models, there is on this foot particularly, on the Contemporary original, the inside toe of the dog on a normal foot is put there. The dog doesn't come right straight down and have a foot the same size

as his bone and hair. He has a foot to stand on. In order to eliminate the undercuts in the Contemporary model or in any model, that had to be pared away a certain amount with a knife or a carving tool. You can see he comes down much straighter. It is done with a good deal more care but it is taken away. Also, as I showed you the other day on the Contemporary original, the hair on the inside of the ear or the thickness of the ear had to be increased from the original so that there wouldn't be any undercut to pull away. The same thing is done on the Woolworth model. I don't have to show you both.

Q. You are referring to the gray model, Plaintiff's Exhibit F? A. Yes. The feeling in here done with less regard for the original model. It has thickened that whole ear. Actually that ear wouldn't be any thicker than from my finger to the outside edge. [Indicating] That is all filled in and this is shaved off with no regard for the dog having any underfoot, pointing to the front foot of the original. This has been pared away. I could take a piece of clay and put that right back and you would find the same thing right there. That plus these grooves would make up the, really the only essential changes in the models. The ones on the undercutting are things that are essential for casting. This is either for a difference of appearance or to make the hair stand out more. We spoke of trimming the other day. Any dog that grows a coat—I trim cockers all the time, more for pets—I trim them for show but the dogs that come in for pet trims you do every day in the week and no dog would ever grow a coat—this dog was made, and I will speak of the Contemporary original, but you can see the same on the Woolworth original, he was made in a show trim. The cocker grows a good coat on him. If he ever grows a coat of this type he has on his belly coat and his chest coat, what we call feathering, and in back, he would also have a fairly heavy coat,

sometimes very heavy, but I will say fairly heavy, on his neck, on his head on the top parts of his ears. When we give a pet trim, we take the clippers and clip that head right down. In a show trim, you clip it in the other direction. It doesn't look as newly done. It is clipped down to here [indicating] and then there is long hair. If that weren't there, there would be a large bulge right on the top here. You just wouldn't see that drop of the ear. You wouldn't see a skull, you would see the hair hanging all across the top. It would be almost as long as the hair is here. My method of indicating hair is to build it up. One is called sculpture and the other is carving. When you dig in, it is carving. It is brought down from a block but you don't get a round form in carving. You get a gouged in form. I would have carved some of the eyes but my tool would dig in. Most of the work is done by putting on form. This dog shows his show trim in that it doesn't show large hair. You trim down the sides of his thighs, down the front of his leg and particularly in this, in his hair, this here is very long and that hair would grow naturally, almost as long as this. He is frimmed under his neck to a clean sweep. We would make him look throaty if he had the hair on it. This Woolworth Exhibit F has the lines on top, to be sure, and anyone trying to interpret that as a dog would, in their minds, take off the hair—looking at the dog, if they weren't thinking of this, they would in their minds take off that coat and they would get a shallower, thinner dog, a smaller dog, but actually this is the form and the hair was put into it. In other words, you have to put the coat out of your mind. If I could bring into the court some plasticine and fill in those hairs, you would see the identical dog. I can take a caliper and show you. I will admit the spring of ribs is not as great because this has been washed. You will find a slight discrepancy in the spring of the ribs. In the width of the tail, I will take the widest point I can find and the length

of the tail and I would like to make a pencil mark, if I could, to show where I put them.

The Court. Go ahead.

The Witness. You will find them exactly the same. The length of the back, the height of the shoulder—I will go anywhere you ask me to—the same on the other dog. The height of the tail, length of the head, back of the skull to his nose—exact same distance. The width of the head you will find a little discrepancy on on the washing of the paint but it will be so tiny that anyone will be able to admit it. I will give you height proportion from the foremost point here [indicating] to the last form of hair on the back. Any place else anyone else wants to ask me to measure? I can take a string with a complete form—I don't want to have anybody think I am doing sleight of hand, anybody could do it if they like.

The Court. Is it true you wouldn't find two cocker spaniels the same?

The Witness. You wouldn't find two dogs alike, saying nothing about the models.

The Court. And you wouldn't find models?

The Witness. If I sat down, I would not make those dimensions, even trying.

The Court. As a lady with sufficient experience to qualify as an expert, would you say that this dog, so-called Woolworth dog, is a copy from the model—

The Witness. I would say it is exactly the same model. It has these lines and other things but I don't want to have any quarrel with anyone about it.

Q. Can you go further on that? You said it was exactly the same model and will you tell us what you mean in that respect? A. I mean that it is—that both are the same model with slight, superficial changes on it.

The Court. And the chief superficial change, from your point of view, is on the back?

The Witness. Is a change for the casting plus the hair.

The Court. That's right.

Q. And when you say "change for casting" you mean casting into ceramics? A. Yes. As I say, the paint was washed off there. I can take a cast that was made from the same gelatin mould, which is what they use for the plaster. I can take the first and last cast and find a slight difference in the same casting, the same lot.

Q. From the same mould? A. I would take the first and the fiftieth and I will find discrepancies in them.

Q. Did you hear Mr. Moyer yesterday talk about the first model which he said he made in 1938 and which he said he carved from a larger plaster model? A. Yes.

Q. Will you tell us whether that is a practical possibility? A. Your carving would give an altogether different effect. You can see a carving effect in the eyes here [indicating] but you don't get the free form. I can show you on this one because of the markings on top. You don't get a rounded form from carving. You get a hard, cold, clean-cut form. You don't get any free, soft lines. This model, if you let me fill those lines in without adding one thing, you would see the exact same sort of modeling form.

Q. Mrs. Hall, are you familiar with the English cocker spaniel? A. I am.

Q. And the American cocker spaniel? A. Yes.

Q. They are two different types of spaniels? A. One is an outgrowth of the other. One, the English, has an aristocratic head. It has much less stock, which is the change of the skull here [indicating] and the American cocker has a round, apple head and the English cocker has a squarer head, almost flat on top. He has a—it is much more of a distinguished look. A cocker has a merry, bright look to it. If you see an English cocker, they have an English look, an aristocratic look. They are—a good English cocker has a good spring of ribs, a well set back shoulder. I speak of a well set back shoulder which would automatically make an angle in the shoulder joint to this bone from here to here. It sets his leg un-

derneath his body, underneath his shoulder. His leg would start from underneath here. The English cocker is a little narrower through the chest but a good one—

Q. Would you look at that gray plaster model, Exhibit F, and tell us whether that is English or an American spaniel? A. They are both American.

Q. Is it also true of the Woolworth ceramic dog, Plaintiff's Exhibit 2? A. It is American.

Q. Tell me one more thing. You have told us that the Woolworth gray plaster model has been modified to eliminate undercuttings? A. That's right.

Q. To permit it to be reproduced in ceramics? A. Yes. In that way you have changed the type of foot in some degree. You have made a smaller foot and it appears because the sides are taken off, it appears to come out further in the front. It makes it look more that way [demonstrating]. It is the same width foot. I believe it will measure so.

Q. Would you tell us— A. I think it would measure so on the bottom—

Q. When such changes are made as you have described, to eliminate undercuttings to permit the plaster model to be made into ceramics, does that change an American cocker spaniel into an English cocker spaniel? A. It wouldn't.

The Court. I ask this without indicating any point of view. You have testified, in answer to several questions by Mr. Porter, and then he went along another line. Did you hear Mr. Moyer testify yesterday?

The Witness. Yes.

The Court. Could this model here, referring to the Woolworth model, have been prepared in the manner and form which was testified by Mr. Moyer?

The Witness. I don't see how it could.

Q. Can you give your reasons for it?

The Witness. In the first place it would take a knowledge of a cocker to do it. You would never get form, carving down. You wouldn't get the form, almost a liquid form, a free, soft form. It could be done, in my opinion, maybe with a pointing machine. That is completely mechanical. I still think any artist could tell the difference, could tell that this was a model, from a pointing machine model.

The Court. When you say it isn't, you take into consideration the size of the Woolworth model as it was indicated by you in the various measurements you made?

The Witness. These are the same size here,—

The Court. No, I mean the size of this model here [indicating], referring to the Woolworth model, and the size of the other model, which is the Contemporary Arts model.

The Witness. In my measurements—I would like to have anyone do it themselves.

The Court. If it was prepared in the manner and form as Mr. Moyer said it was, would you expect those measurements to be the same?

The Witness. I don't see how they could, not unless—

Q. What was your answer, please? A. Not unless it was done with a pointing machine. However, I wouldn't expect it to be the same if he had modeled it.

Cross Examination by Mr. Smerdon.

XQ. [Handing] I show you Exhibit 7. That is one of Contemporary Arts dogs? A. Yes.

XQ. And that is known as a particolored dog? A. Yes.

XQ. Would you say that is a life facsimile of a cocker spaniel? A. That is a cocker spaniel.

XQ. Is that a good product? A. You mean a good cast or a good model?

XQ. Good model. A. That is the same one. It was good in the opinion of the time I did it. I don't mean

the age. I might do it differently today as my own modeling increases.

XQ. Is that a type of dog that would attract dog fanciers if they were in a store looking for a cocker spaniel?

A. It should be.

XQ. And the sale price of that dog was \$15? A. I don't know too much about the sale price of any. I stay in my own field.

XQ. You don't know what these dogs were selling for?

A. I actually don't. I know around what price.

XQ. You were getting some royalties from them? A. Yes, I received my original price and some royalties.

XQ. Were you receiving royalties on some one hundred items? A. I suppose so.

XQ. You designed 100 items for Contemporary Arts?

A. At least.

XQ. So this was only one item of 100, as far as you were concerned? A. That's right.

XQ. And your royalty on this dog would be approximately one-one-hundredth of the total number? A. I wouldn't say that. I don't know how their sales would be arranged but I wouldn't say they were selling all 100 at one time.

XQ. You don't have any breakdown as to the amount of royalties you received from this particular cocker spaniel; is that correct? A. That's right.

XQ. On this dog here, Exhibit F, for the defendants, it is grayish in color, is it not? A. Yes.

XQ. [Indicating] This is the plaintiff's Exhibit No. 11 which is white? A. Yes.

XQ. Plaster when it is new, is it apt to be whitish in color? A. That's right.

XQ. Is this a new plaster on Exhibit 11? A. Plaster, when it is new, if it is kept covered it should be white for any amount of time. I have seen very old ones still white.

XQ. You don't hold yourself out as a plaster expert? A. I have done work with it. I am not an expert.

XQ. Were you present when Mr. Press scraped these three marks? A. I didn't watch him do it.

XQ. As an expert you know you can take some water and pour it on this dog and take calipers and make all kinds of hair? A. A certain amount.

The Court. She has testified it was soaked in water four or five hours.

The Witness. That can be done. It doesn't have to be done.

XQ. As a matter of fact a five year old child in Sunday school could make a plaster model, wet it sufficiently damp to make marks on it? A. I think so.

XQ. Conversely is it not true if you have a dog with hair, that if the same dog is wet you could take the hair off and make the model you came up with? A. Say that again, please?

XQ. If you take a plaster model that is sufficiently wet—
A. Yes.

XQ. Without any particular skill at all and it has hair on the plaster model that is wet, it is a very simple process to take the hair off and come up with a model like you have? A. No, if you took the hair off that, you would come up with a model of whatever the deepest marking is.

XQ. But the size of the model is immaterial. You can make dogs in any sizes, can't you? [Indicating] Here is Plaintiff's Exhibit 12; isn't that a much smaller dog than Plaintiff's Exhibit— A. These two dogs are the same size.

XQ. We don't quarrel with you on that but you can come up with a plaster model of any size? A. Yes.

XQ. As a matter of fact in Taunton they sell cocker spaniels at \$5, that size; do you know that?

The Court. Are you going to prove that?

Mr. Smerdon. I can.

The Court. I am not going to admit it unless you are going to prove it.

XQ. Will you admit these can be made in any size?

A. You can make any model any size.

XQ. So that the fact that these two appear to be the same size, there is nothing unusual about that? A. Nothing unusual about the height possibly, but the height here [indicating] and the height here and the height here and the height here would be more than coincidence.

XQ. Do you know when this model was made, Exhibit 11? A. He testified yesterday it was in 1942. I looked at the date.

XQ. Where is the date on the dog? A. I don't know but I looked at the paper yesterday, when I said I wasn't positive on the date.

XQ. Did you make this particular dog? A. No, that is a cast. Who made that and when, I don't know.

XQ. This may be of very recent date, as far as you know? A. Yes.

XQ. Mr. Press could have made it in the last 30 days? A. At any time.

XQ. Do you know Mr. Press has seen this model before he came to court? A. I don't know whether he has or hasn't.

Mr. Smerdon. Are you going to put him back on the stand?

Mr. Porter. Yes.

XQ. To judge cocker spaniels in show position in the dog shows, they have expert judges, don't they? Mr. Roling, have you ever heard of him? A. I have my husband here—

XQ. Did you go to the Eastern Dog Show this year? A. I did.

XQ. Did you see Mr. Roling down there? A. I was downstairs at the crates. I didn't watch every ring.

XQ. Isn't it true a judge such as Mr. Roling will look at cocker spaniels, line them up, like this [demonstrating], and look at them from the back for a considerable amount of time and then turn them to the side and from the front a considerable amount of time? A. That's right.

XQ. And even an expert such as Herbert Roling from New York has a great deal of difficulty judging the best dog in the show; true? A. I don't know. It depends on the dogs he has in there.

XQ. I am talking about cocker spaniels. A. Depending upon what group of cocker spaniels.

XQ. Take the black dogs. A. Individual dogs. You might have all these dogs looking the same from the ringside. One dog might be undershot. He might not have any difficulty in putting him down.

XQ. Is there— A. It depends upon the dog.

XQ. Isn't it true a full-grown cocker spaniel is about the same size as any other full-grown? A. There is a tremendous difference in sizes.

XQ. How about when they are younger; are they approximately the same size in the litter? A. They might not be. It depends upon the breed.

XQ. You have raised cockers? A. Yes.

XQ. Have had litters? A. Yes.

XQ. Six or seven in a litter? A. Yes.

XQ. And people come and buy one of the dogs? A. Well, they are all gone.

XQ. Have you ever seen anybody have trouble distinguishing dogs in a litter? A. I have seen people having trouble distinguishing children from one another.

XQ. You don't mean anatomically it is as easy to distinguish one dog from another as it is one child from another? A. It is to me.

XQ. That is because you are a dog expert? A. Well, I don't know as I am a child expert.

XQ. You have a couple of children? A. That's right.

XQ. Anyway, on the dogs that we have here on the stand, you can distinguish the Woolworth

dogs and the Contemporary Arts dogs without any trouble, can't you, as an expert? A. From the lines put onto the dog.

XQ. And there is an essential difference between these dogs and that was one of the reasons why these are selling for \$1.19 and these were selling for \$6, \$7.50 and \$4 a piece? A. What is the reason?

XQ. Because there are essential differences in the dogs? A. The reason it was selling was because of the essential difference—I don't see that—you have to phrase that again.

XQ. Well, these dogs here (indicating) were selling for \$1.19? A. Yes. If you say so; I don't know.

XQ. That is a matter of record. [Indicating] This dog was selling for \$15 and this dog, \$7.50. This dog here was \$4. I am now talking about retail prices. The reason that people would pay \$15, \$7.50 and \$4 for these dogs of Contemporary Arts was because you sculptured them and they were works of art, you being a well-known sculptress; isn't that true? A. I think that art is a thing you can put a price on anywhere you want. You can put a low price on it if somebody wants to sell—

XQ. Doesn't the law of supply and demand have anything to do with selling cocker spaniels? A. It shouldn't have anything to do with art, but it does.

XQ. So that if you were a good, well-known artist, your products demand greater prices, do they not? A. I have to go back into my own work. I have done work when I first got out of art school for such prices that nobody would believe it.

XQ. That is because you were not well known? A. It was the same work by the same person and it was simply a matter of money not being offered. At the same time I was given the \$300 from Mrs. Huntington. At the same time, I have done a piece that high [demonstrating] for \$7.

XQ. Didn't you get \$300 for some Gaines dog? A. That was \$500. Just graduating from art school, the piece Mrs. Huntington put into Brookgreen Gardens—she is the tops, if anyone wants to look her up. It is what they give you.

XQ. Our witness, Mrs. Biggs, testified that these were well sculptured, well designed by a person who knew her business? A. Yes.

XQ. You don't disagree with that, do you? A. I don't want to get into personalities.

XQ. They are your dogs? A. Whatever her opinion is is her opinion.

XQ. Isn't it your opinion these were good dogs? A. They were made as representative of the best I could find.

XQ. And you used dogs in your kennel and pictures to get the perfect cocker spaniel? A. I made my ideal dog.

XQ. And a dog fancier would recognize these as good replicas of cocker spaniels? A. They should.

XQ. [Indicating] This here looks like a cheap imitation, doesn't it? A. I wouldn't say so. I would say that the hair is definitely—

XQ. Cheap imitation of a cocker spaniel?

The Court. Let her finish the answer.

A. [Continued] I would say the hair, if it has to be on there should be on correctly. It is on incorrectly. That is the only thing I can say. Anybody who wants to overlook that, it is still a good cocker spaniel.

XQ. Anyone interested in good cocker spaniels would immediately know that is not a good dog? A. I wouldn't say that. He has the hair—if anybody wants to overlook the hair, it is still a good cocker spaniel in show position. It is the same thing.

XQ. Do I understand you to say the person in Zanesville, Ohio, couldn't come up with a model cocker spaniel dog with an original design; you say that is impossible?

A. No, I didn't say that; I said he couldn't come up with that model.

XQ. Isn't it perfectly plausible he had his own dog in 1938— A. Particularly not if he had an English type dog, he would not come up with that. If he had his own dog covered with hair, he would hardly even be able to see the depth. He makes his own statement there were folds of hair. That dog has not got greater hair, no matter what your marks do. There is not a great deal of hair on that body. You couldn't see the form through there. You don't see the form on a full coated dog.

XQ. Do you think anybody would be deceived if they saw this dog in a store and then saw a dog made from this mould [indicating]?

The Court. Just a minute. There isn't a question of deception here. I will exclude that question.

XQ. Now, you say you know something about plaster—

The Court. I don't want to get into the question of deception—get into the question of unjust competition. It isn't a part of this case.

XQ. [Handing] I will ask you to look at this Defendant's Exhibit F. Will you look along the bottom of the feet. Do you see a wearing along the bottom of that foot on the left front foot? A. What do you mean?

XQ. A wearing of the plaster. Do you see a wearing of the plaster there? A. A breaking off on the very edges here [indicating]?

XQ. Yes. Isn't that a wearing spot there? A. I don't know what you mean by "wearing." There is no place in which that could be worn. It is simply deteriorating.

XQ. Yes. Now, if you have fresh plaster and you rub your finger on it, do you come up with any white? A. You could, you could come up with white when it is fresh or when it is old.

XQ. [Indicating] That white is off this white dog, would you say? A. It could be if he was wet or could be if he was dry.

XQ. And if it is an old dog, that is deteriorated, the white would or would not be apt to come off so fast? A. I couldn't definitely tell you. I would say I don't know. I think you could take either one of these dogs and go up and draw on the blackboard with it.

XQ. [Indicating] Can you look in there and tell us the color— A. All plaster doesn't get that color.

XQ. What color is that in there, would you say? A. I would say it was grayish.

XQ. Wouldn't you call that bluish gray? A. Not particularly bluish. It is almost the color of a lead pencil.

XQ. What do you know about plaster; wouldn't you say from that indentation right into the dog itself, that it is plaster that has aged very well? A. I have never in my own knowledge, as I say—I have seen plaster left around that is just as white. I don't think you can tell from the—[indicating] this is a coating.

XQ. Can't you tell from the inside? A. That has been broken. You break a fresh place and it is just as white as this. You scratch that and you will find it.

XQ. Look at the wearing around there [indicating]. A. That is rubbed over, anyway. You scratch a fresh place, you will find chalk white underneath.

XQ. [Indicating] Does that look like a model made in the last 30 or 60 days? A. Why should it be?

XQ. Doesn't that dog look as if it was made 10 or 12 years ago? A. I wouldn't have any way of knowing, over the drying period of the dog.

XQ. Have you ever made a study of the age of plasters? A. No.

XQ. So that— A. I am not qualified.

XQ. You can't tell us one way or the other whether this is 10 or 12 or 60 days old? A. No.

The Court. [Indicating] That is where the legs are broken?

The Witness. That's right.

XQ. [Indicating] Would you say these legs were broken at the time this dog was made? A. I wouldn't have any knowledge of when or how or why except that they do often remove legs when moulds are made to make ceramics. They often have to remove one or one on one side and one on the other or all the legs, or it could be dropped. I have no knowledge.

XQ. Can you give us an opinion as to whether all legs were broken approximately the same time or not? A. I can't say, when it was done. I wouldn't say it was broken accidentally. I don't believe it would break all the legs accidentally. I don't believe you would find a great deal more loss of plaster—you would find hunks all over the place.

XQ. Wouldn't you say these three breaks [indicating] are approximately at the same time, pointing now to Defendant's Exhibit F, the two rear feet— A. The only way I would have of saying it is the same would be that this approximately looks like the same color glue.

XQ. Wouldn't you say that is much older on the left front foot? A. It could be older and there might be something on it. All of this has a gray washed color on it.

XQ. On top of that? A. It could be over it, too. I have no way of knowing.

XQ. Isn't that the—when they want to get a gray dog, they wash it with some kind of material? A. No, they spray it. If this was sprayed, it has been washed off since.

The Court. It is clear those legs have been glued on.

The Witness. Oh, yes.

The Court. You testified, as I remember it, several days ago that the reasonable explanation for the breaking in the legs of a mould could be accounted for when it was put through some process in reproducing the so-called Woolworth dog.

The Witness. I don't remember saying that. Someone may have said it but I will say it is often done. It is often done it reproducing. That eliminates the number of pieces you have to make.

The Court. It is your position this Woolworth dog is a copy of this model here [indicating]?

The Witness. These are both Woolworth. [Indicating] This is the one from which this one was made.

The Court. [Indicating] That and this one was copied from this?

The Witness. They are the same.

The Court. That's right.

XQ. Wouldn't you say that the date of 1938 on the bottom of that dog is reasonably consistent with the age—

The Court. I very frankly—that date of 1938 is there for whatever purpose it is and it is for me to find out whether or not that is a genuine mark or not and I have a very, very definite opinion on that now.

The Witness. This here is a wash—

The Court. I am perfectly willing to have you introduce any evidence which will show that mark was put there by anyone. Your client, Mr. Moyer, has not been able to explain that mark in here "AM CO 1938."

Mr. Smerdon. We have a witness that will throw some light on this, if your Honor will keep that question open in your mind.

The Court. I won't foreclose you on that. At the time he said he moulded that, he said he wasn't working for any company by the name of "AM".

The Witness. [Indicating] This discoloration is not discoloration you would get from an old dog. It would still remain white, but plaster is plaster.

XQ. I am not saying the color alone indicates age because it could be made of any color originally but I am

{saying that evidences of wearing around the feet would indicate age, would it not? A. No, it depends upon the treatment it has had.

XQ. [Indicating] Can you show me any wearing on this dog? A. You haven't got any coat on this dog.

XQ. Is there any wearing on this dog? A. There should be. Of course this was lacquered [indicating] and that is a wash.

XQ. Exhibit 5 of the plaintiff. Is there any particular wearing on that? A. No particular wearing. There is a slight wearing where it has touched—I can't see any reason for wearing on that because there is no portion on the inside of its legs that touches the ground. There is very little, anyway. A plaster model only wears from use and it depends upon how much use it has during what amount of time.

XQ. [Indicating] Here is another exhibit, Exhibit G of the defendant's. Do you see where that is chipped off there? A. Yes.

XQ. What is the color of that? A. White plaster.

XQ. Doesn't that look fresh and white to you? A. Chip that off and you will find the same thing.

XQ. Do you see the marks inside there— A. On the side, the only way I can tell it is wearing is where the white plaster is. [Indicating] Right here is about the only place, if you hold it over the light. There is white plaster that shows this has worn off.

XQ. [Indicating] That is a recent chip, is it not? A. I don't know.

XQ. Would that not be a recent chip? A. It could be.

XQ. You have the gray underneath here in the dog itself, that would be an old piece? A. I don't think the graying has anything to do with oldness.

XQ. Well now— A. [Indicating] There is a bulge on his eye, right here, with white plaster showing.

XQ. Do you realize he has been carried from Zanesville, Ohio, on an airplane and in a suitcase and in there several days: you understand that? A. Sure.

XQ. So that there can be recent chippings on it? A. Surely.

XQ. Wouldn't that account for the white marks in some places and very dull grays in others? A. No, the gray—

XQ. The difference in time the chips were made— A. You get your white plaster as long as you take off this gray wash on the surface.

XQ. Doesn't plaster tend to deteriorate and change very slightly in color to a more grayish color? A. I have them hanging around the house a matter of five or ten years and that is just as white.

XQ. For my own information, is this the same type of plaster as in ceilings? A. Not really. You get a lime type plaster.

XQ. Is it akin to it? A. It may be.

XQ. Don't your ceilings at first— A. They are gray from oil and soot in your home.

XQ. As they are exposed? A. Yes.

XQ. And aren't these dogs exposed? A. But I don't find a graying. This dog is about like you would find in a cast in a cellar. He has dirty marks on it.

Mr. Porter. Referring to Plaintiff's Exhibit 11.

The Witness. Ordinarily there is a coat of shellac put on most pieces anybody wishes to preserve to keep the piece and then they put a finish on it.

Mr. Smerdon. Your Honor, we have a witness that has a reservation to Ohio on a plane at 12:30 and we would like to put him on.

The Court. I don't think you have any objection.

Mr. Porter. Every time I give them a concession of that sort, it backfires.

The Court. They have a witness who has a reservation on the plane at 12:30. You are going to be allowed to cross-examine; you are not going to be checked in your cross-examination.

Mr. Porter. I would like to accommodate him but—

The Court. Where he has a reservation, we ought to do it.

[Discussion at the bench.]

The Court. I am not going to do it—I thought it was a new witness.

Mr. Barnes. He has a plane reservation to go back to Ohio.

The Court. All right. I thought he was a new witness.

HARRY MOYER, Recalled.

Direct Examination by Mr. Smerdon.

Q. Mr. Moyer, I show you Exhibit F for the defendant [handing]. You testified you found this in a cabinet in the LaPere Pottery Company sometime the early part of this year? A. That is correct.

Q. Did you wash the dog at that time? A. I took it over to the hydrant and put it under water and washed the dust and dirt that was collected. It was laying in this cabinet a long length of time; I don't know how long.

Q. What was the condition of the legs when you picked the dog up from the cabinet? A. Three of the legs had been stuck on there by some substance, it looked like some kind of shellac. I was not sure what it was. After washing, I put the—shellacked the legs back on. There were three of the legs had fallen off and I had placed the legs—put some shellac on the legs and placed them back and stuck them back on and after I done that I took our sizing material we use for sizing plaster where this was very—well, just rough, dirty, I took the sizing material and sponged over it and set it up and let it dry.

Q. Will you tell us, the three legs you put back together,

when they broke in the cabinet, on Exhibit F? A. The two hind legs and this right foreleg—the left foreleg—

Q. Will you tell us what you know about its condition only? A. It is just as I found it. It appears to be a chip placed back there by someone and that has been—it looks like a shellacking there.

Q. In your opinion is that shellac of much older vintage than the other shellac or not? A. Well, it does have the appearance of being older, that is true. It is much more soiled than the other. It looks like it is a little older.

Q. In regard to LaPere Pottery, how did they go about selling these dogs to the roadside stands; through what medium?

The Court. If he knows.

Mr. Porter. I wonder if this is proper rebuttal.

The Court. Mr. Smerdon feels, he wants to revert to something—I don't object but he wasn't the general manager of the sales department nor did he have anything to do with it. How is he going to testify? He said yesterday he didn't know.

Mr. Smerdon. I might say, your Honor, the defense has been somewhat handicapped for this reason, that Mr. Otto Harold, who is the owner of LaPere, was scheduled to fly up and appear here as a witness but he was taken ill at the last minute and he was confined to his bed and we haven't had him available.

Q. Is that true? A. Yes.

Q. Was he scheduled to come up here? A. Yes, sir.

The Court. I am not going to concern myself with that. If you had called it to my attention, I would have given you every chance in the world. There is also the chance of getting depositions. You still have a right to do it, so the fact that the general manager and the executive vice-president of the General Electric isn't able to testify doesn't

qualify the foreman of one of the divisions of the General Electric to testify in a capacity which would only be limited to a sales manager or one of the executive officers that supervises it.

Mr. Smerdon. I appreciate that but the only reason I am pointing—

The Court. Mr. Porter is going—

Mr. Smerdon. If the case is continued, we would appreciate an opportunity at the continued date to have this man come on from Ohio when he is recovered from his present illness.

The Court. Why don't you take a deposition.

Mr. Smerdon. I would rather have the witness here, your Honor, so you could judge him. Your Honor doesn't have to pass on that now.

The Court. You can reach a saturation point on these cases where you have to close the evidence. In view of the fact that it wasn't called to my attention, I would be inclined to say to either side that I think there has been plenty of time to produce the testimony in this court and I don't think I would be inclined to allow you—

Mr. Smerdon. I was assuming you were going to continue.

The Court. But only for the purposes of argument and preparation of the briefs because both counsel felt they wanted time and I thought they were very reasonable about it in view of the peculiar characteristics of this case and its technical nature. Mr. Barnes felt he ought to have time and so did Mr. Porter. That was only for the purposes of preparing findings of fact and conclusions of law and getting their arguments ready.

Q. Going back to this Exhibit F, Mr. Moyer, to your knowledge were there jobbers that worked out of the Burley Pottery Company back in 1936, 1937 and 1938 that handled this dog:

The Court. Will you repeat that?

[The question is read]

A. They did not handle this dog in 1928 or 1936 and 1937, but 1938, because I went to work in 1938 for Burley.

Q. So that in 1938 jobbers were handling this particular dog from Burley Pottery?

The Court. We will exclude that. There is no evidence to indicate he had any talk with any jobbers. He has already testified he couldn't give a single instance of a sale of that dog outside of saying that it was at roadside stands and he was asked to indicate some roadside stand and he couldn't do it. That has been gone into thoroughly and I think I will exclude it.

Q. Did you see these dogs on sale at any roadside stands? A. That I couldn't say.

Q. To your knowledge did you ever talk to any jobbers that came in there that were handling this item? A. I have talked to many jobbers because they frequent the mould shop of any pottery.

Q. Did you ever talk to any jobber in connection with this particular mould of a dog that you say you prepared in 1938 from your own—from studying your own English cocker spaniel?

The Witness. I cannot recall any—talking to anyone about this piece.

Q. Well now—

The Court. The answer is that he can't.

The Witness. I can't.

Q. You didn't talk with anybody regarding this dog when you were at the Burley Pottery? A. Only Mr. Burley.

Q. But you, of your own personal knowledge, knew it was being marketed in Tennessee—

Mr. Porter. Wait a minute.

The Court. No, I will exclude that.

Q. Did you have any knowledge it was being marketed in any other states other than Ohio? A. There was trucks—

Q. Yes or no; yes or no. A. Yes.

The Court. Of your own personal knowledge?

The Witness. Could I explain?

The Court. Was it of your own personal knowledge or was it based upon what someone else told you?

The Witness. My own personal knowledge, yes, sir.

Q. Will you tell his Honor what states these dogs were sold in?

The Court. What is the basis of your own personal knowledge? Tell me what you mean when you say that?

The Witness. I saw trucks come in from Carolina, Tennessee, and buy up merchandise and the dogs were part of the merchandise which was bought from Burley and taken into those states for sale.

The Court. That is, the dogs that you—

The Witness. That I modeled.

The Court. Can you give me a name of a truckman or a person in Carolina, a jobber or anyone, that you can, that took the dog that you say you modelled out of the Burley Company?

The Witness. I seldom remember names. I cannot.

The Court. Can't you give me the name of any of them?

The Witness. I cannot, no, sir.

The Court. You knew this suit was pending months ago, didn't you?

The Witness. Yes, sir.

The Court. You knew that was an important thing to give your counsel for the Woolworth Company?

The Witness. Yes.

The Court. Or your own boss?

The Witness. I never gave a thought—

The Court. But you knew that and made no effort in any way, directly or indirectly, to find out any person or persons, the name of any truckman or the name of any retailer or jobber to enable this Court to know that this particular dog was sold or taken from the Burley Company?

The Witness. No, I never did.

Q. Did you ever see any brochures back in 1938 that had this dog in Burley Pottery? A. Could I have that question again?

Q. Did you ever see any brochures of Burley Pottery which had these dogs displayed in them?

The Court. I suppose you mean the catalog.

Q. [Continued] Catalog. A. They did not put out a catalog.

Q. How about LaPere Pottery? A. They put out catalogs but I could not say whether they had that in their catalog or not.

Q. You are not sure? A. No, sir.

Q. The jobbers you spoke of, will you explain the custom of the jobbers, how they handle this type of product in Ohio—

Mr. Porter. I wonder if it is of any materiality unless somehow we can tie up the dog? He doesn't know of any jobbers that handled this dog.

The Court. You didn't do business with jobbers, did you?

The Witness. Not personally.

The Court. I will exclude it.

Mr. Smerdon. Well, your Honor, I offer proof on that.

The Court. How can he say—he has to say what other people told him.

Q. To your personal knowledge were jobbers handling this particular dog item? A. There was orders came into the mould room for moulds for producing them for jobbers.

The Court. I will exclude that. The best evidence is production of mould orders.

Q. Were you producing this dog in 1938 for orders that were coming in through jobbers; yes or no? A. Yes.

The Court. Can you name a jobber now to this Court for whom that was prepared?

The Witness. I cannot.

Q. You never had any actual dealings with the jobbers but you knew they came to the plant; is that right? A. That's right.

Q. Is it the custom for a man in a factory to receive any royalties if he is on salary in Ohio? What is the custom if you produce something— A. Yes, it is, depending on contract.

Q. But the reason you didn't get any royalties was because the Burley Company burned down; is that it? A. They had their fire and burned before I made this model. I did not work for them at the time.

Q. When was the fire? A. In 1937.

Q. And you went to work with them when they had a reduced plant; is that correct? A. That is correct.

Q. Was that as a result of your free lancing? A. Yes, sir.

Q. That was the first time—

Mr. Porter. Wait a minute,—

Q. Was that the first time you made that model? A. Yes, sir.

Q. And that is your original model? A. That is the model, exact like the original model I made.

Q. I don't mean the same plaster; is this your model [indicating]? A. That is true, yes, sir.

Q. Of course all of these are made from some original one.

The Court. You didn't make that one, did you?

The Witness. [Indicating] This piece here? No.

Q. How do you know you didn't make that one? A. I never made but one plaster model.

The Court. Where is that one?

The Witness. It has been destroyed.

Q. They testified, the other side, they destroyed theirs too, but the dies in LaPere Pottery that made this dog were the dies that were in the Burley Pottery in 1938?

Mr. Porter. Wait a minute. He didn't say anything of that sort:

Q. Are you familiar with the dies in LaPere Pottery?

A. Yes, sir.

Q. Whether or not those are your original dies you personally made up when you were connected with the Burley Pottery in 1938? A. I am very sure they are.

The Court. Are those dies still in the LaPere Pottery factory?

The Witness. Yes, sir.

The Court. You haven't seen them during this trial, have you?

The Witness. No, sir.

Q. How much do those dies weigh, approximately? A. It is pretty hard to guess.

Q. The dies at the plant, roughly, what do they weigh?

The Court. For this particular mould that you say is yours.

The Witness. I would estimate around 100 pounds, if they were dried out.

The Court. That is put together—each part—

The Witness. Oh, no, altogether.

The Court. How many parts are there?

The Witness. [Indicating] This one here, I think, has six parts.

The Court. So that each part would weigh probably 15 pounds?

The Witness. They would be different.

The Court. They would average 15 pounds. 100 pounds equals 15 or 16 pounds.

Mr. Smerdon. You may inquire.

Mr. Porter. I do not want to waste any more time on this fellow.

FRED PRESS, Recalled

Direct Examination by Mr. Porter.

Q. I understand the Jan Allen dog, 271, which is shown in our Plaintiff's Exhibit No. 5 was first made by Contemporary Arts in March, 1942, from previous testimony.

A. Yes.

Q. Will you tell us whether you continued to make that in the succeeding years? A. Yes, we have.

Q. Extensively? A. Yes.

Q. Are you still making them? A. We have stopped the production.

Q. When was that? A. When—

Q. Well, a date, the last time you made them. A. We stopped production shortly—it must have been in the middle of 1949.

Q. Could you tell us the differences between casting in plaster and ceramic? A. In plaster—

Q. And ceramics? A. Yes. Casting in plaster involves a flexible mould. Therefore there are not quite as many demands on the sculptural content of the figure. A design can be more involved, more complicated, for casting in plaster since the flexible mould will come away as it is pulled around protrusions. Whereas, casting in ceramic

relies upon an inflexible mould, one made of several plaster sections. When, in order to make a model or in order to prepare a model for ceramic casting which has first been designed for plaster casting, it is necessary to make alterations on that model so that the inflexible mould sections can be pulled away easily and freely without damage to the cast or the mould sections.

Q. And that is this filling in the undercuttings that you have explained previously; is that correct? A. Yes.

Q. And look at the Defendant's Exhibit F here and tell us whether or not that plaster model has been prepared for ceramic reproduction and point out the features of it. A. [Indicating] This plaster model, it is very obvious to me it has been prepared for casting in ceramic or for making the mould which would be used in casting in ceramic. The undercuts which were involved in the depth between the ear and the head, the undercuts which may have been involved about the legs and particularly about the rear feathering were provided for, either added to or cut away, so that they made it possible for the inflexible sections of the mould to come away easily from the cast.

Q. Now, there have been hairlines incised on the gray plaster mould, have there not? A. Yes, there have.

Q. Is there any reason for that, for purposes of ceramic reproduction? A. Yes, there is a very specific reason. If, in advance, the aim is to produce an inexpensive job, it is possible to indicate a textural defect in the surface of the dog with a single firing of glaze by cutting into the dog so that the thick, syrupy glaze settles into those low areas, thus giving you the definitions you see here and feel are here. As the glaze runs away from the surface and puddles into the area, it has a lighter quality and gives you the lighter illusion of the hair and gives you shadow and definitions of the hair markings.

Q. State whether or not that makes it possible to make a ceramic at lower cost. A. It definitely does make it possible to provide that textural effect on a ceramic piece.

at much lower cost than it would if, for example, it were to be done as was the case on Plaintiff's Exhibit No. 7.

Q. How many fusings—how many sprayings or glazings does Exhibit 2 get? A. It gets a single glaze, generally done before any firing has taken place.

Q. Is that the only glaze? A. That is the only treatment.

Q. How many glazes does— A. Plaintiff's Exhibit 6 has been—

Q. Your porcelain red dog. A. —has been fired twice.

[Morning recess]

Q. On Wednesday, Mr. Press, you cut some incision lines representing hairlines on the side of this white plaster model of Contemporary, Plaintiff's Exhibit 11. Is that the only way in which such hair markings can be made on any model? A. Well, no. There are several ways. We could take the original model and cut the marks into the model. That would be, to my way of thinking, the most accurate way of doing it. Another method would be to take the converse mould and to cut your incisions into the mould. That would give you a rounded surface to the appearance of each hair demarcation. You could get around that by taking a plaster cast from your mould and sanding down the surface of those, flattening them out and then reproducing from another mould, making your mould from your model.

Q. Can you tell, from the gray plaster model how that was done, incision lines? A. My guess would be either way.

Mr. Smerdon. I object. No guesses.

The Court. I think that is a sound objection. If you know how it was done, in the light of your experience and judgment, give your opinion, but no guesses.

The Witness. In my opinion I feel it could have been done either way.

Q. Would you take Contemporary's white plaster model and also indicate on the underneath of the belly portion of that model the same marking "AM CO 1938" as appears on the gray plaster model, Exhibit F? Show the Court how that can be done. A. Previous to our hearing here, I wet the dog again. It has been standing here several days and has gotten dry. You may not be familiar with the exact content of this particular plaster. It has a mixture of glue which comes to the surface of the plaster on hardening and forms a crust of glue. That is the reason we moisten the plaster. I did pour some water on it and I am not sure it was sufficient but I could very easily—

Q. Will you make those markings, "AM CO 1938" on it? A. Yes. [The witness proceeds to incise the plaster] I might show you, your Honor, there was nothing there before I started.

The Court. That's all right.

Mr. Smerdon. We will admit, to save any time, that wet plaster can be marked.

The Court. All you want to do is to show "AM CO" could be put on that one by wetting it?

Mr. Porter. Yes, and could be put on this gray plaster model as recently as two months ago, if anybody wanted to do it or had any reason to do it.

The Court. If that is admitted, do you need to have Mr. Press—they admit you can do that.

The Witness. It is almost done.

Mr. Porter: He has "19," all he needs is a "38."
[The witness continues to incise the plaster]

Q. Having marked the date "1938" on there, is there any contention on your part this model was made in 1938; Plaintiff's Exhibit 11, that you have just marked? A. No, it has not been.

Mr. Smerdon. I ask that that go out, for the record. It is perfectly obvious.

The Court. I think that is so, Mr. Porter. The question and answer may be stricken.

Q. Will you look at the gray plaster model, Defendant's Exhibit F and tell us if you can tell from looking at it or from any testimony Mr. Moyer may have given how it got its gray color? A. Yes, his testimony was very obvious to anybody who has dealt—

Mr. Smerdon. Oh, I object to that as being—

The Court. Oh, no. Read the question.

[The question is read]

A. Yes. ~~Mr. Moyer's~~ testimony described to me exactly how he arrived at this coloring. He explained that he discovered the dog under layers of dust. Now, if I had planned to clean a dog or plaster model under layers of dust, being familiar with plaster I would have blown the dust off because plaster is extremely absorbent. Mr. Moyer did not blow the dust off but wet it under a bubbler or fountain, I don't remember what he mentioned, and used a sponge to attempt to remove that dust. By so doing the water immediately turned the dust to mud. The mud was absorbed into the surface of the porous material and he dirtied the dog. He then explained that he noticed the dog was very dirty and so he proceeded to the next step which was to take a fixative or some kind of shellac, the name of which I do not recall, and to apply it over that. That fixed the dust permanently or, not necessarily permanently, but it fixed the dust in such a manner so that this dog was properly given the illusion of being antiqued. That is one of the processes, I might add, that we might use in attempting to produce an antique finish on a model. Also that coat of shellac would have sealed the surface of the plaster so that if you put your hand on it, you would not come up with a white coating of plaster as you would with a plaster that had not been sealed.

Q. Is that your own process of antiquing a new piece of plaster? A. No, we don't use that specific method because we like to seal the pores of the plaster first but that is a process which we would use over a base coat of color but done on a plaster surface with no primer, you get—you do get this very uneven result.

Q. Now, tell us, Mr. Press, in your experience whether plaster indicates its age such as in your model, Plaintiff's Exhibit 11, and Defendant's Exhibit F? A. There is no way of determining the age of plaster. This model could have been—

Q. Referring to Exhibit F. A. Yes, the gray model could have been made as recently as two months ago. It could have been made as long ago as 100 years ago.

Q. If you scrape plaster which—a plaster model which is dirty on top from dust, for instance, what is the color underneath? A. White. I might add that there are in existence today models in plaster in museums on public view that were done as long ago as hundreds of years ago that are in good condition and are white.

Mr. Porter. That's all.

Cross Examination by Mr. Smerdon

XQ. Now, Mr. Press, in looking at Exhibit F and Exhibit 11 would you say those two dogs are made of approximately the same materials, too? A. By "approximately", what do you mean?

XQ. Well, the same type of plaster? A. What do you mean by the same type of plaster?

XQ. Gypsum Plaster. A. There is obviously a gypsum content in each.

XQ. So that in your opinion would you say the plaster was approximately the same in each dog? A. I couldn't say that. I don't know about these formula mixtures of each.

XQ. From looking at it, would you say— A. I think they would both come under the generalized heading of plaster dogs; generalized heading.

XQ. So that nobody, looking at the dog, could tell the difference and you as an expert would say they come under the heading of plaster dogs? A. Under the general heading of plaster dogs.

Q. Are there different types of plaster dogs? A. Yes, there is Barga-Luca plaster type of dog and there is a hydrocal plaster. There is a regular soft moulding plaster. Those are three prominent types.

XQ. And what is the gypsum plaster? A. The gypsum is part of the basic structure of all plaster.

XQ. And that is contained in those three types you have just given? A. Yes, sir.

XQ. Are you an expert on plaster? A. No, I am not.

XQ. So that you wouldn't know how to tell the age of plaster; is that true? Is that right, if you are not an expert, you wouldn't know? A. Yes, I would.

XQ. You would know though you are not an expert at it? A. Yes.

XQ. All right, what are the different ways you can tell the age of plaster? A. By research. You can't tell the age—I am sorry—

XQ. Let's continue this. You made the statement you can tell the age. Now, how— A. No, I did not. I was confused on that question.

XQ. You said research. What research is required to determine the age of plaster? A. My own specific research?

XQ. No, I am talking generally. A. I can only speak of my own specific research.

XQ. If you break these two dogs open, isn't it true both are white? A. That's right.

XQ. There is no difference inside of these dogs on the plaster as far as color is concerned? A. As far as color is concerned, no.

XQ. As far as chemical content, there might be a difference? A. Yes, sir.

XQ. Now, what research would there be? A. My research would depend on consultation with experts in the plaster field.

XQ. So that you would have to rely upon expert testimony in order to determine it yourself? A. Yes, sir.

XQ. Now, will you tell his Honor if it is not true that plaster expands in the making of these moulds? A. There is a slight expansion.

XQ. And depending on the type of plaster you are talking about, you might get very conceivably a different amount of expansion? A. That I don't know.

XQ. That you don't know? A. No.

XQ. Now, in your opinion, wasn't this model made, the hair—was it inside or outside the dog at the time the model was made originally? A. Definitely not.

XQ. Don't the incisions come outward? Aren't these hair incisions outward? A. I think if you look up the word "incision" it is a mark made into a solid surface.

XQ. Would it be hard to take a cast of a model like that? Wouldn't it actually be very easy? A. To make a mould from this?

XQ. No, you take a cast—as I understand it, you have a covering around the dog, the mould, and you get the model— A. You are not explaining it very well.

XQ. I am not an expert in the field. A. I have to understand your question before I can answer it.

XQ. Where do you get the model from? A. It is designed originally by the sculptor.

XQ. How do you get the replica? A. We make a waste mould which is then filled with plaster. The waste mould is chipped away and we have a permanent, or rather a permanent—

XQ. Die? A. No, what we then call the original model since it is the only model in existence, the other having been destroyed.

XQ. In production wouldn't this item come off very easily? A. Come off what?

XQ: Off the production line? A. You mean out of the mould?

XQ. Yes. A. Fairly easily, yes.

XQ. There is nothing to prevent it. Those incisions aren't deep, are they? A. No, they would come out of the mould.

XQ. So that if Woolworth is buying this dog from somebody on a production, it should come off easily? A. Out of the mould?

XQ. Yes. A. Surely.

XQ. It is much easier to produce this type than a dog like this [indicating]? A. Yes.

XQ. You were selling these dogs for \$15? A. Yes.

XQ. Selling these [indicating] for \$7.50. Exhibit 7 you are selling for \$15? A. Yes.

XQ. And Exhibit 6 you were selling for \$7.50? A. For \$9.

The Court. That was the wholesale price?

The Witness. No, that was the retail price. The stores sold them for that.

XQ. And you sold these types of dogs, referring to Exhibit 7, to dog fanciers? A. We sold them to dealers who in turn sold them to dog fanciers.

XQ. Who are the dealers you are talking about? Didn't you sell to Rubel & Company at Fifth Avenue? A. They are our agent.

XQ. And they handle the sale? A. Yes.

XQ. Any other agents? A. No.

XQ. So that Rubel & Company were selling this dog, Exhibit 7, and in turn different stores were selling this or at the dog shows, for \$15; right? A. Yes.

XQ. And that is because this dog is particolor? A. What is because this dog is a particolor dog?

XQ. Because of the price? A. You mean the higher price is due to the fact that it is a particolored dog?

XQ. Isn't this dog, Exhibit 7, a lot more difficult to make than Exhibit 6? A. Yes, it is.

XQ. Much more work than Exhibit 7? A. Yes.

XQ. Tell his Honor what the work is in addition on this type of dog over Exhibit 6, pointing to Exhibit 7? A. I might point out the white glaze which has been applied to this dog was applied in a single—in the first single firing, the same general procedure that might be used here. Referring to the Woolworth dog, Exhibit No. 2. However, we did not cut into the texture—into the sides of the dog to create a textural effect. We were dependent upon a stage of the process which we were going to apply later which is a very difficult and involved process of overglazing and this is all done by hand. The overglaze is a combination of glass particles which are mixed with oil and applied onto the surface of the white glaze. Then the dog must be taken, after this is done, and placed in a kiln and fired. In the firing, the oils burn off and disappear. The glass particles, however, combine with the glaze underneath and they fuse together and you have this result.

XQ. And that is one of the reasons and the main reason that it costs \$15 at retail because it is a fine product; true? A. Yes.

XQ. Would you call a dog, Exhibit 7, a specialty item that stores carry? A. Well, I don't know how you would identify it; I don't know what they call it.

XQ. You wouldn't say people would go into a store and pick this up as a little trinket? A. It is not a trinket.

XQ. Looking at Exhibit 2, this is an ordinary little trinket you would pick up at the five and ten? A. That is not the way I describe it, no.

XQ. You don't say this dog has the same value as that dog there, comparing Exhibit 7 and Exhibit 2? A. Are you talking about the dog or the way it was done?

XQ. I am talking about the finished product. A. You have two things together.

XQ. This dog sells for \$1.19, Exhibit 2, doesn't it? A. Yes.

XQ. This dog [indicating] sells for \$15? A. Yes.

XQ. The processes are entirely different in regards to the two dogs? A. No.

XQ. Haven't you just described very intricate processes? A. I described one process.

XQ. Isn't this all done by hand, these spots? A. Those spots are put on by hand.

XQ. [Indicating] No spots on this dog put on by hand? A. No.

XQ. [Indicating] No hair on this dog that is incised, is there? A. No.

XQ. You wouldn't be fooled by going into a store and if you saw Exhibit 2 and Exhibit 7, as to which dog was a valuable dog and which one was just a cheap cocker spaniel dog? A. You mean a valuable dog or valuable model of dog?

XQ. Valuable model. A. [Indicating] This is not a valuable model, referring to the mechanical structure of the material and so forth.

The Court: Are you using him as a standard of the ordinary person that would buy that or as a standard of what he has represented to the Court that he is, a specialist in his line, a designer, sculptor and a producer of these models of all sorts?

XQ. You have only sculptured, actually, five dogs; isn't that true? All the rest have been sculptured by Jan Allen? A. That is true.

The Court. He said he sculptured a good many other figurines.

Mr. Smerdon. I don't know as he is an expert on dogs, your Honor. The weight of the evidence—

The Court. That's right.

Mr. Smerdon. If he has only done five dogs and all the others have been done by Jan Allen. We are talking about Jan Allen dogs.

XQ. [Indicating] So that you would say this is a very cheap and poor imitation of a cocker spaniel, wouldn't you? A. No, sir.

XQ. You think that is a good cocker spaniel? A. I would qualify that, I would say it was a cheap and poor imitation of our cocker spaniel.

XQ. Well now, let me ask you this: taking Exhibit F, you said that that dog could be a few months old, six months or two months old; is that what you said? A. Yes.

XQ. Or it could be one hundred years old? A. Yes.

XQ. And for all you know, it may be one hundred years old; is that correct? A. For all I know, it is not one hundred years old.

XQ. You said it could be. A. You asked me "for all I know".

XQ. What do you know as to the age of that dog, Exhibit F? A. You mean what do I know personally—

XQ. What do you think the age of that dog is? A. I think the age of that—

The Court. He means the Woolworth model.

Mr. Smerdon. Exhibit F.

A. [Continued] My opinion would be that that dog originated when—

XQ. Not your—

The Court. Let him answer.

Mr. Smerdon. It isn't responsive. The age is what I asked.

The Witness. You asked my opinion.

Mr. Smerdon. I asked the age of the dog.

The Court. You asked him his opinion.

The Witness. Do you want my opinion or the age?

XQ. I want your opinion as to the age, two months, two years— A. My opinion would be the dog originated when they first planned to produce their ceramic model.

Mr. Porter. And when was that?

The Witness. In my opinion, some time in 1949.

XQ. Now, tell us what you know about crystallization processes with reference to plaster. A. What do you mean?

The Court. Don't you think you are going pretty far afield now?

Mr. Smerdon. He has made the statement that dog in his opinion was produced—

The Court. He made it before and he was cross examined thoroughly by a distinguished member of the bar of this court and I am not going to retry this whole situation and I don't want to interpose but—

Mr. Smerdon. He is basing—

The Court. I held Mr. Porter down a little bit and I don't want to go into the ceramic character of these dogs. The sculptor went into it, he went into it on his dog and was cross examined and if there is anything you feel you require to be brought out which would in any way serve as a basis for rebuttal, that is different, but I think we ought to get along and try to get the case closed if we can.

Mr. Smerdon. That is what I was doing. He has expressed an opinion and I assume we would have a right to attack it.

The Court. He wasn't attacked by Mr. Barnes. He cross examined him very carefully on that.

Mr. Smerdon. He has expressed it on the rebuttal.

The Court. What was the question?

[The question is read]

Mr. Smerdon. This is a plaster model.

The Witness. What do you mean by crystallization?

XQ. I am asking you the questions. A. I don't understand your question.

XQ. In other words you don't know anything about crystallization processes? A. I didn't say that. I said I did not understand your question; it is not clear.

XQ. With age of plaster, isn't there a crystallization that goes on in connection with that particular type of substance? A. It is a question that doesn't—

XQ. —mean anything to you? A. No.

The Court. He says he doesn't understand what you mean by crystallization; is that what you mean?

The Witness. Yes.

XQ. You are not familiar enough with plaster as an expert— A. I am not a plaster expert but I am familiar with the workings of plaster.

XQ. Now, do you know what is meant by resonance? A. Resonance?

Q. Yes. A. As to sound?

Q. That is correct. A. Yes.

Mr. Smerdon. [Taps an exhibit]

XQ. Do you hear that? A. Yes.

XQ. I am looking now at Exhibit 11. Now, taking—first of all, when did you make Exhibit 11? A. Some time this year, without putting a date on it.

XQ. Give us the approximate date of the time you made that plaster model, Exhibit No. 11? A. It is hard to state, your Honor. We have hundreds of models. I don't personally supervise the casting of each piece. I couldn't put a date on it. It might have been—I say some time this year. It could have been last year; I don't know. I didn't watch each piece come off the production line.

XQ. Isn't this a very recent piece, very white? A. The whiteness has nothing to do with it.

XQ. I am asking you when— A. I don't know. I would like to—by saying that I may not have answered correctly because I do not see these pieces come off, every single one of them, and I can't identify the exact time.

XQ. Well, was it after Exhibit F was made that this—
A. I say I can't identify the time.

XQ. So that it might be this Exhibit 11 was made after you saw Defendant's Exhibit F? A. I can't settle you on that. I don't remember.

XQ. Do you remember my coming down to 31 Stanhope Street and showing you Exhibit F? A. I do.

XQ. And full disclosure was made to you as to the nature of the defense of the defendant here? A. At that time?

XQ. That this was an original model. A. That was—

XQ. Didn't you look at that model of the dog then? A. Yes, I did.

XQ. How long did you look at it then? A. Less than five minutes.

XQ. As a matter of fact, it was about a minute, wasn't it? A. About that.

XQ. You were out in the shop. Mr. Fox came over and said, "Take a look at this" and you looked at it and handed it back to him and didn't consume more than 60 seconds, did you? A. It could have been about that time.

XQ. After that you could have made this model here, Exhibit 11?

The Court. Did he make it; that is the question.

XQ. Did you make it after? A. I say I can't tell you when this model was made. I do not watch these pieces come off the production line.

XQ. [Tapping an exhibit] I am taking Exhibit 11 and I am tapping it. A. Yes.

XQ. Do you hear the sound? A. Yes.

XQ. [Tapping an exhibit] I am now taking Exhibit F for the defendant; do you hear the sound? A. Yes.

XQ. Aren't the sounds of those two dogs entirely different? A. They are.

XQ. Isn't that due to the age of the two different dogs?
A. Would you like me to tell you what it is due to?

XQ. I am asking you if it is due to the age of the two different dogs? A. No, sir.

The Court. What is it due to?

The Witness. I explained I had two dogs in court the other day. This dog is soaked with water and therefore has a dull sound. This dog [indicating] is thoroughly dry.

XQ. Let's see. [Handing] Has this dog been soaked, and I am now looking at Exhibit No. 12? A. No, it hasn't.

XQ. Take this one; this is a dry dog? A. Yes.

XQ. [Tapping an exhibit] Do you hear that sound? A. Yes.

XQ. It is not very resonant, is it? A. Not particularly.

XQ. Now, take the defendant's Exhibit F. [Tapping an exhibit] Do you hear that sound? A. Yes.

XQ. That is a very, very resonant sound, isn't it? A. Yes.

XQ. Now, the difference in the tones of those two dogs and the difference in the resonance explains the difference in the age of those dogs, doesn't it? A. Are you saying that or asking me?

XQ. I am asking you. A. It does not.

XQ. Do you know anything about resonances and crystallization and the processes that plaster undergoes over a period of years, as an expert? A. I know it doesn't change.

XQ. As an expert you know that? A. An expert on what?

XQ. Plaster. A. I am not a plaster expert, I told you.

XQ. So that you don't know anything about the differences in resonances? A. I know something about it, yes.

XQ. That is a dull thud in Exhibit 12, isn't it? A. Yes.

XQ. You tap it with your fist? A. Yes, sir.

[The witness taps an exhibit.]

XQ. Do you hear the difference? A. Yes, much higher pitch.

XQ. Very much higher pitch. The more resonant article is the higher pitch, isn't it? A. Well, I am not too familiar with the word. If you say so.

XQ. So that the difference in the age would account for the difference in resonance? A. Certainly not. That is not so. That is not true.

XQ. Is there a different tone there?

Mr. Porter. Mr. Smerdon, are you calling yourself a plaster expert? You are testifying here.

Mr. Smerdon. I will put him on in about five minutes.

Mr. Porter. It would be better if you did rather than testify yourself.

Mr. Smerdon. You will get it, don't worry.

The Witness. I explained, your Honor, there were—I explained about three different types of plaster.

The Court. When are we going to get through having new issues raised in this case? You tried the case on an issue predicated on the opening made by a member of this court. A man came from the West and testified. There is a time when the party litigants have to stand or fall upon the testimony of witnesses. Now we are going to have a new turn in connection with production of a witness who should have testified on direct. I am not going to permit him to testify. If I do that, there is going to be an expert on resonance the other way and we are never going to finish.

Mr. Smerdon. This is an offer of proof. We have produced in this trial in good faith the original model which was designed by Mr. Moyer.

The Court. It is my obligation to find, to weigh Mr. Moyer's testimony to settle the factual conclusions arising out of his testimony and that has been given to me under oath. He is gone and when the time comes—I am going to keep my mind wide open and form no conclusion of any kind. I expect that to be submitted in factual brief form. I am not going to have this case go so that another day there is an expert and the next day there is an expert for something else and we will be hearing experts ad infinitum. I am going to exclude testimony of this expert or any further experts, raising different questions of issue. I have been very generous with counsel in allowing them a wide latitude in cross-examination.

Mr. Smerdon. May I say a word now, your Honor?

The Court. Surely.

Mr. Smerdon. The defense has maintained throughout the trial that we have an original dog design.

The Court. That's right.

Mr. Smerdon. And we have, in good faith, produced that design.

The Court. That's right, and you put in evidence on direct to prove it. Now, the evidence in rebuttal, a lot of the evidence outside of the testimony of the sculptress might well have been excluded by me and I allowed latitude within my discretion because I want to be fair to both sides.

Mr. Smerdon. May I finish—

The Court. You can't try an action of tort on the theory of ordinary negligence and then when you get through trying it readjust your whole offense and try it on the theory of gross negligence. The defendant, on the other hand—if you are for the plaintiff—the defendant can't go ahead

by the same reasoning and, after hearing all the evidence, come out with a new defense. I don't like to preclude you from doing it—

Mr. Smerdon. May I finish my statement, your Honor?

The Court. Surely.

Mr. Smerdon. We brought Mr. Moyer from Ohio.

The Court. That's right.

Mr. Smerdon. And we have felt throughout the trial that we have a perfectly valid defense to this action. No. 2: The model has been put in as an exhibit. No. 3: They have had their witness who is an expert on sculpturing testify that she designed an original model. That we haven't questioned at any point in this trial. No. 4: They have now put in, in rebuttal, a man that is an expert in his field and he has testified from this witness stand within the last five minutes that this dog, in his opinion, was produced when the Woolworth dog was first put out on the market.

The Court. He testified to that on direct. He had that in cross-examination. He gave that same testimony on direct.

Mr. Smerdon. I don't think he went that far, as to point of time.

The Court. He testified it was made after that model of Jan Allen's which was registered in 1942. All that has been taken care of. He said he isn't a plaster expert from the very start. He said that resonance isn't caused by that. You can impeach a witness' credibility on a material matter. On an immaterial matter, it is discretionary with me and I am not going into it.

Mr. Smerdon. Your Honor can sum up the rebuttal with just two or three words, and that is that the defense has produced a fake model here. That is the whole rebuttal of this case.

The Court. They maintained it from the start. In the introduction of their evidence they maintained that.

Mr. Smerdon. But they have gone into the thing further on rebuttal and therefore we have an expert from M. I. T.; he is a professor—

The Court. There has been some evidence in rebuttal but the case was thoroughly and capably tried in direct by both sides. Both sides might well have rested at the time they saw fit. There is some reason for recalling the sculptress, I can understand that in the light of the testimony of your expert dog fancier. I am going to rule as a matter of law she is not an expert on sculpture.

Mr. Smerdon. But we are now offering—when this witness is finished, and I am through with him now—you can sit down—we are now offering Professor Voss of M. I. T. who heads up the Engineering and Building Constructions Department and has been there for 22 years. He is the head of the department; he is the director of the Building Materials Research Laboratory that deals with cementitious materials, including plaster, gypsum, cement and concrete; he is Chairman of the Administrative Committee of the American Society for Testing Materials; he is a member of the Committee of Development, Research Council of America, Academy of Sciences; he has a B.S. degree from the University of Illinois; he has an Architectural Engineer's degree, receiving that degree in 1912; he also has a Master of Arts degree from M. I. T. in 1932; he has worked on ceramic tile, plaster, moulds, and other forms of that material and has been a consultant on architectural engineering since 1919 on consultation and has consulted engineers on the Naval Hospital in Mary-

land and also the Hartford Hospital in Connecticut and is an eminent authority on this subject. It weighs heavily with counsel for the defense—

Mr. Porter. Does he know anything about when this Mr. Moyer made that model?

Mr. Smerdon. When I finish, you can talk. I am making a statement to the Court.

Mr. Barnes and I feel that the accusation has been made that our witnesses have produced a fake model. We have never seen Professor Voss and Professor Voss has never seen us; we have never heard of him before. We called him on the telephone at M. I. T. I don't know the exact nature of his testimony but in fairness to counsel for the defense and to the Woolworth Company that has been accused of alleged infringement, we would like to hear what this man has to say and we offer him as a witness in sur-rebuttal to contradict the evidence they have been putting in on their rebuttal which all has gone into the effect we have a fake model that was dreamed up in the last two or three years.

The Court. Are you contending to me you and associate counsel for the first time today have been apprised of the fact that the issues in this case haven't raised the question of genuineness of that dog?

Mr. Smerdon. We have never questioned it, your Honor.

The Court. You took the dog on your own interrogation that you yourself—someone in behalf of the respondent took the dog down to the place of business of Contemporary Arts and the dog was shown to several experts there.

Mr. Porter. Your Honor, I think we have a point of fact here which may clarify the matter. As I understand Moyer's testimony, there is no

contention at all that that particular model was made before 1945.

Mr. Smerdon. 1938, he testified.

Mr. Porter. No, not that model.

Mr. Smerdon. The exact replica of that model.

Mr. Porter. But not that model. That was not his testimony. It was not made until 1945, he said, when he went to the LaPere Pottery.

Mr. Smerdon. The exact facsimile—

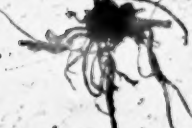
Mr. Porter. He didn't see it until February of this year.

The Court. He said an exact facsimile was made in 1938. How is your expert going to benefit the Court?

Mr. Porter. We haven't got the model he said was made in 1938.

Mr. Smerdon. That model was made in Burley Pottery and acquired by LaPere Pottery, which is of great materiality. They say we have cooked up a defense.

The Court. They didn't say it yesterday, they said it in their pleadings; they said it right along. They said nothing except what is usually said—I am not expressing any point of view. They said that which lawyers have a right to say, predicated upon their talks with their clients and arising out of what is necessary to create an issue. The very nature of the claim of the petitioner is a claim for relief in equity and a claim which involves two simple, factual questions: this was an infringement of a copyright of a cocker spaniel dog that was registered in the United States Copyright Office in 1942. If the Court should find that dog was a dog that was in existence back in those days long before the dog was put on the market by the Contemporary Arts, then it is manifestly fair. The decision would have to be in your favor. Now,



that raises a lot of other questions involving the question of damages and as I said yesterday, you were going to finish this up. I gave you reasonable latitude. If you were calling back that lady, I certainly would not have any objection but I am not going to open up this case so that it is a battle of professional wits between professors from universities or technologies who have never seen that cast in their lives except within the last few days. I will exclude it. You don't have to save your rights; they are saved. I am not going to accept that testimony. If I do allow it, it will lead into something else. The most you can prove is, I suppose you will say that cast was manufactured back in 1938 and then he is going to contradict the other witness who said it wasn't, that it was a reproduction of what he created in 1938 which was destroyed in the Burley Company and he found this in the gallery of moulds that were with the LaPere Company; isn't that right?

Mr. Porter. Yes, sir.

Mr. Smerdon. And Mr. Press has gone on the witness stand, your Honor. He said he can't tell the age of plaster. He is not a plaster expert.

The Court. So what—

Mr. Smerdon. —but yet he has made the statement this is a recent dog. I think in fairness to the defense—

Mr. Porter. He didn't say it from that model. You asked him his opinion when he said the thing was made and he said it was made when the LaPere Company was first selling these things to the Woolworth Company. The evidence shows it was the first of January, 1949.

The Court. The sculptress gave very, very pertinent testimony with reference to it on direct and rebuttal and her testimony on rebuttal was ad-

missible for the purpose of contradicting your expert. She gave measurements.

Mr. Smerdon. Now we have an expert to contradict her.

The Court. This man would probably make the same statement because he qualified as an expert the other day. Certainly your expert isn't going to qualify as a sculptor.

Mr. Smerdon. He is an expert in this field of the age of plaster. He has dealt with it 25 years and is the head of the department at M. I. T. It will be helpful to the Court and helpful to us.

The Court. I think you should have had that evidence on direct. You object to it?

Mr. Porter. I do, sir. Not only that, I will supply your Honor with cases which say you do not have to take expert testimony if you don't want to. It is within the province of the Court.

The Court. I am going to exclude it.

Mr. Smerdon. Your Honor will save my rights?

The Court. Certainly.

CAROLINE F. BIGGS, Recalled.

The Court. How long will you take?

Mr. Smerdon. One hour for lunch, I guess.

The Court. I mean with the witness. You will be a little while, won't you?

Mr. Porter. I don't know what she is going to testify to but anything, I would imagine, would be short.

The Court. I am not going to limit counsel for the respondent on this witness because I can appreciate how important he regards her testimony and we have done our best. We will recess now

until—we should finish in three-quarters of an hour. Is this the last witness?

Mr. Porter. Of course I have no more witnesses.

The Court. Is this your last witness?

Mr. Smerdon. Other than the professor.

The Court. No, I have excluded his testimony. I am not going to listen to any more experts. I think it is within my discretion to do it. I wouldn't do it now. If he came in as your witness on direct, I would have allowed him to testify but it is evidence you should have had on direct and I don't say that to be critical, I am saying it only because you have to have some symmetry about the trial of cases. I give lawyers a great latitude but if I have him on, someone else comes on and then someone else comes on and we are retrying the case and my experience with experts, in the experience of any lawyer or judge, one testifies one way and the other testifies the other, whether he is a psychiatrist or whether he is an orthopedic man.

Mr. Smerdon. I don't think there are many men in the country—

The Court. I have so many—

Mr. Smerdon. I don't think there are many men in Massachusetts that would be qualified to render an opinion of this type.

The Court. You assume a man who comes from Technology, it sets him aside. They come from graduate schools of Harvard or Technology and they are distinctly set aside as supremely superior to anyone else. I am not saying they are not. Experts might well come from Tufts, Bowdoin or from Boston College or Boston University or from Yale or Cornell. What I mean is this: that knowledge isn't exclusively set aside for one class of experts to the exclusion of others. I suppose, as

a matter of fact, if that was relevant, the chances are that Mr. Porter might say "I don't question his qualifications; I will admit he is an expert." The fact that a person's scholastic training and special experience is only of importance for the purpose of having him qualified to express an expert opinion.

I think there is a time when you must definitely adopt a certain course of procedure with reference to the trial of cases. You tried your case—my mind is wide open. Mr. Porter tried his case on his theory and my mind is wide open and I certainly respect the excellent qualifications that counsel have and that is the way I am going to proceed. I am going to give plenty of opportunity for you to submit findings of fact and conclusions of law, and it is mostly factual insofar as it concerns damage and I have indicated to Mr. Porter what my feelings are on that.

Mr. Smerdon. If your Honor feels no useful purpose would be served, we will rest now.

The Court. I mean you have had time to do it and it wasn't done. That is all I can do. I have been giving everyone a sweepingly wide latitude in presenting the cases.

We will recess until quarter past two.

[Noon recess]

Afternoon session.

Mr. Smerdon. Your Honor, continuing my offer of proof, I think I stated the qualifications of Professor Voss but I didn't get a chance before lunch to state what he would have testified to.

Your Honor, he would have testified that the mould from which the gray dog was made, Exhibit F, had the hair contours in it because there are no moulding undercuts and that any flat surfaces that appear on the gray dog, Exhibit F of the defendant here were done on it after it was taken out of the mould.

Secondly, he would have testified that the indications of wear, that there are indications of wear on the gray dog, Exhibit F, which are recent and indications of wear on the gray dog, Exhibit F, which are old; that gypsum was the substance in this dog as in the other plaster models and that, when freshly broken, it will powder. If it is worn and has gotten old and deteriorated, it will not powder, and that there are places on Exhibit F of the defendant which would not powder due to the age and deterioration of the substance.

Third, Professor Voss would have testified that any dimensional measurements made on any casts from even the same mould but of different mixes of gypsum could give different values.

Fourth, the professor would have testified that the old break on the left forefoot and wear of different areas in that section of Exhibit F would have, in his opinion, indicated that the dog had been cast or produced at approximately the time that the date indicated on the bottom of the mould on Exhibit F of the defendant or the gray plaster model.

Fifth, incisions tend toward outward movement for easy stripping of the gray model, Exhibit F of defendant, and that mass production could easily be obtained by the use of this particular mould and model.

Sixth, the professor would have also testified that the resonance of the dog when it is tapped

by the hand or fist indicates that it is completely crystallized, which is a process—which he would have testified is a process that goes with the years and indicating an old, very old model.

Seventh, and lastly, the professor would have testified that the date on Exhibit F, the gray model of the defendant, is unqualifiedly and absolutely, in his opinion, authentic.

And that is the offer of proof, your Honor.

The Court. And I am excluding it.

Mr. Smerdon. Your Honor will save our rights?

The Court. That's right. I am excluding it. No need of giving any reasons. You know that is evidence you could have offered in direct and you didn't do it. I am excluding the testimony for other reasons I needn't give.

[Conference at the bench]

[Brief recess]

Direct Examination by Mr. Smerdon.

Q. Just as a little background here, as I understand, you breed and raise many cockers? A. Yes, I have.

Q. Approximately how many? A. Oh, I guess about 300, all told; maybe four.

Q. When was the first time you saw any of these models? A. The time you came at the Eastern Dog Club Show in Boston.

Q. Did you know who I was? A. No, I thought you were selling dogs, or something.

Q. And you were shown this dog [indicating], Exhibit No. 6, and this dog which is Exhibit No. 2, the Woolworth dog? A. I was shown the Woolworth dog and one by the Contemporary Arts.

Q. [Indicating] Were they identical to this? A. It was what the—Contemporary Arts one was this type and this looks exactly like the Woolworth dog [indicating].

Q. Did you know the purpose, why I showed you the two dogs? A. No, I had no idea what you had in mind.

Q. What did you say about them? A. [Indicating] I said this one looked like it came from the five and ten and I said this looked like a good cocker.

Q. Was it after you told me that that I identified myself as being connected with the attorneys for the Woolworth Company? A. You identified yourself as being an attorney and then you explained these, where these did come from.

Q. And that was your honest opinion before you knew anything about the case [indicating] this was a five and ten dog, looking at Exhibit No. 2, and this was a cocker spaniel, looking at Exhibit No. 6? A. Yes.

Q. Are you of the same opinion today as you were at the Eastern Dog Show in Boston? A. Yes, I am.

Q. Will you take these two dogs and show his Honor closely—

The Court. She showed me them pretty well. Is there anything she needs to say in addition?

Mr. Smerdon. Yes.

Q. Will you show his Honor anything in addition you didn't show him the other day, particularly in reference to the feathering? A. [Indicating] There also is a difference in the ear carriage. This one, the ear carriage starts away up here, on the Woolworth one, on Exhibit No. 2, which is the older type of cocker. I still feel—the ear set starts much higher and here it is on the level of the eye, which is the standard called for in the cocker spaniel of today. In the back is the feathering. Years ago the coat definitely was heavier on here. We have been breeding and eliminated that and we didn't have the feathering, as much feathering on the legs as on the more modern cocker. There is a difference here on the

feathering which is brought from back here and on this, it is the shorter type that they didn't have in the old type cocker. There is a difference in the feet and, of course here, this is in the Woolworth Exhibit No. 2.

The Court. Talk a little more slowly.

The Witness. The Woolworth Exhibit No. 2, there is the indentation, the cut out here and then the cut out here which, on this, you see—

The Court. By "this" do you mean on the ceramic one?

The Witness. Yes, on the Woolworth ceramic, No. 2, there is a definite cut-out around here on the face whereas on this one there isn't that cut-out. It is done, I would say, modeled with the idea that someone is going to paint the nose on it.

The Court. [Indicating] I think the testimony is that this is the ceramic.

The Witness. Yes. What is that [indicating]?

Q. They are both ceramic. A. On No. 6 this is done, was modeled, I feel, with a definite intention of—this one [indicating], if you feel the cut-out; you, yourself, can see the hair. This is the more old-fashioned type cocker with the ear starting up here and the ear here, the whole thing starts down here. Do you see what I mean? It starts right up on the top of the head. The ear, years ago, the ear did start at the top of the head. Now we have bred them so that we start—in the standards; it says the ear starts at the level of the eye.

The Court. The distance between the eyeball and ear is about the same on both.

The Witness. I wouldn't know anything about measurements.

The Court. Wouldn't you say it is the same?

The Witness. I would say—

The Court. Let's take the right side.

The Witness. I am talking about the ear, where it starts. I would say the width, you are talking about, is about the same. I am talking about where the ear starts. [Indicating] On this one it starts the way we have them now, down here.

Q. Will you point out any differences in the throats of the two dogs? A. I did that.

The Court. You told us that yesterday.

Q. On the rear legs? A. I just pointed that out to the Judge.

Q. In your opinion would anybody in the dog world be influenced in buying models like that Exhibit 6 if they saw models of Exhibit 2? A. No, because I don't think this shows any quality that this one shows [indicating].

Q. The quality of Contemporary Arts is or is not far superior— A. It is far superior to Exhibit No. 2.

The Court. Will you base that as one conversant with cocker spaniels; isn't that so?

The Witness. Yes.

The Court. Rather than because you have had any training in sculpture?

The Witness. I have no training in sculpture.

The Court. You don't claim—

The Witness. I claim to know cocker spaniels.

The Court. You were consulted in connection with the outlines—

The Witness. With the finer points—

The Court. With the finer points of cocker spaniels—

The Witness. Of the detail on these cocker spaniels.

The Court. And that was by a sculptor?

The Witness. Yes, recently by the Merry Minx Studios in Taunton and by artists I am also consulted.

The Court. As you look at four or five models, you have had no experience which would enable you to tes-

tify, as an artist, that one was better than the other one?

The Witness. I think I can tell which is the better of the two. Then I would have to consider myself as knowing more or less the artistry of the cocker spaniel.

The Court. You never studied that?

The Witness. No.

The Court. You never painted a dog or you never modeled a dog?

The Witness. No, I have done neither.

Q. In your opinion would you know more about cocker spaniels than an artist? A. Yes, definitely.

Q. And they consult you because they don't know as much? A. Yes, for the finer points.

Q. In the last analysis they have to rely on someone like you who is an expert? A. Yes. If they want to know another dog, they go to someone else.

Mr. Smerdon. You may inquire.

Mr. Porter. No cross examination.

The Court. That is all. Both sides rest? All right, how much time do you want?

Mr. Porter. Your Honor, I only ask you this because of your remarks this morning at the opening of court. Yesterday I attempted to show, through Mr. Allen Fox, that the Woolworth Company competition had killed their sale for the No. 271 cocker spaniel, so much so that they just plain had to stop manufacturing and just get rid of it from their line and replace it with another cocker which was still a cocker spaniel in show position but a different model, and that one is the Plaintiff's Exhibit No. 12. Now, if your Honor would like, I can put Mr. Fox on now and show that possibly in five minutes and that is the end of my case, if it is convenient to the Court to do it now.

The Court. I will permit you to do it.

ALAN FOX, Recalled.

The Court. I thought he testified to that yesterday Mr. Smerdon. I thought he did, too.

The Court. Probably there won't be any dispute over it.

Mr. Porter. This is the line of questioning Mr. Barnes objected to.

The Court. I think it went in and I think there was some understanding. Why don't you tell us what you are going to offer?

Mr. Porter. All right, sir. I was going to show, through Mr. Fox, that the cocker spaniel was their most popular dog because of the fact that the cocker spaniel itself is the most popular dog among dog fanciers; more cockers than any other; and that his sales from the beginning, in March, 1942, up to about July of last year, December of 1949, averaged around 150 a month, which was their largest selling dog.

Mr. Smerdon. Well, I object to that.

The Court. He is only just saying what he is going to say.

Mr. Smerdon. I know.

Mr. Porter. And that over the year—over any year the sales were approximately 1,400 to 1,500 and in this respect, your Honor, I am talking about the plaster model, Plaintiff's Exhibit 5, which sold for \$4 retail; and that the reason why they have to replace the dog that was copied by Woolworth is that the dealers just refused to buy from them because they are specialty shops and they call them—they say that they sell to a very particular and select clientele who want authentic dogs and when the same dog is found in the Woolworth stores, they won't have anything to do with it. The line simply has to be withdrawn and one of the difficulties Contemporary Arts encounters in that respect is that if one dog is in the Woolworth Company stores, they disregard the fact that their 99 other models are not; they still

won't touch the line; that to redesign a new cocker spaniel like Plaintiff's Exhibit 12 took Mr. Press some two months in time over all, including his research, which time he could have otherwise been spending in the business; that they ceased their manufacture of this cocker spaniel No. 271 last summer when the Woolworth competition appeared and since then have only been trying to get rid of the dogs remaining on hand and that the sales had fallen off very sharply to 20 to 30 a month in the months since July, 1949. Hence there is a very definite damage to their reputation and good-will, when their specialty, original and authentic models are found in the Woolworth stores in a poorer quality dog and at a much lower price.

The Court. If I am going to go into that, it is going to take a couple of days.

Mr. Porter. Well, that is the story. That is our showing and I would have thought the presentation of it wouldn't have taken really any longer than it took me to state it.

The Court. I know, but I should imagine that counsel for the Woolworth Company would insist upon having Mr. Fox prove that from the books of the company.

Mr. Smerdon. That's right, sales records.

The Court. And they certainly have a right to cross-examine him on the evidence.

Mr. Porter. There is no question about cross-examination.

The Court. I was wondering whether or not you would do any good if you could sit down and look at the books and go over the situation together.

Mr. Porter. And agree if Mr. Fox would be called, he would testify to so and so?

The Court. No, come to some understanding what that would be.

Mr. Porter. Perhaps we can.

The Court. Otherwise I may have to handle this case in another way. If I find it is important, I will go into damages. I will be trying until the 20th of June. You would have a special master to pay.

Mr. Porter. It was not my thought we had to have any master for going into—

The Court. You are entitled—if you offered it—

Mr. Barnes. I didn't think he stated anything in his offer of proof that hasn't either been before the Court and admitted or ruled out.

The Court. I understood Mr. Fox to have testified yesterday and if you feel he did, you can agree upon it, that this new model, model 12, was a model that was designed for the specific purpose of having a new creation. That is the layman's term in that the sales of this Jan Allen model dropped off from the time that the so-called Woolworth model began to appear on the market. It is agreed that they disposed of 129 dozen and no more the minute they found—

Mr. Barnes. 127, wasn't it?

Mr. Smerdon. It was agreed they bought from Sabin's Manufacturing Company 127 dozen.

The Court. That's right. You probably can't tell how many were disposed of.

Mr. Smerdon. That we don't know.

The Court. But you probably could ascertain from that—

Mr. Barnes. We would have to make quite a check on that.

The Court. I think you spoke of the number of stores.

Mr. Porter. It is my feeling, your Honor—

The Court. Your answer to that was that you had no other evidence—I asked you a question and you said you had no evidence that it was being sold by a concern or by a person other than the Woolworth Company. That's right!

Mr. Porter. That's right.

The Witness. We have had no information.

The Court. That's right. Now, I suppose you are going to argue, aren't you, that 127 dozen of these were put in the stores of the Woolworth Company and that there was a large number of them disposed of by sale. You are going to argue that the so-called Woolworth model was an infringement upon the copyright of your client and that therefore, in conformity with the provisions of the yardstick for damages, you are going to ask for \$10 a copy; is that right?

Mr. Porter. Up to \$5,000.

The Court. You can't go over \$5,000.

Mr. Porter. Not over statutory damages, no, sir. It is some 1500 dogs. Of course we aren't contending that people who wanted a—

The Court. That is \$10,000 more than the amount any Judge could give, anyway.

Mr. Porter. We aren't contending that the Woolworth—that anybody wanting the Contemporary Arts Jan Allen model, particularly in plaster—well, that anybody who bought the Woolworth model would otherwise have bought a Jan Allen model. It is merely the fact that it appears in the Woolworth stores that kills the line for this select type of business.

The Court. Sixty per cent of the business, Mr. Press said, was bought by kennel clubs and by persons that understood thoroughly the intrinsic value of dogs and that about fifty per cent was bought by the public that knew nothing about dogs and I suppose your position is that where you lost, you lost the 50 per cent of the public that bought a dog that was a dog.

Mr. Porter. The people who want the authentic model. Of course, it is not unusual—take these original designs of dresses—

The Court. There was some testimony this morning that that isn't a five and ten cent model, the Woolworth

model. It was asserted by one person, who was a sculptor, here that it wasn't so.

Mr. Porter. A good copy.

The Court. That is what I remember. So there you are. I don't know what you want to do. I don't want to foreclose you but I was wondering whether or not you could sit down and come to some understanding of what you might think the damages were.

Mr. Smerdon. As I understand, Mr. Porter yesterday said he would rely upon the statutory damages. I think he made that statement to the Court.

The Court. Come up, gentlemen.

[Conference at the bench]

[Adjourned at 3:30 P. M.]

Plaintiff's Exhibit 2.

(Marked #1)

Sales Slip (1 Dog).

(See opposite page.) 

MADE IN U.S.A.

F. W. WOOLWORTH CO.

19__

**MONEY MUST BE REGISTERED BEFORE
GOODS ARE WRAPPED**

QUANTITY	ITEMS	SELLING PRICE	AMOUNT
1	bag	1.19	1.19
	Tax		3
			1.22
39 N. 3rd Ave. N.Y.C.			

CASE NO. 140 TOTAL

CHECKED AND
PAID BY

**THIS SLIP MUST BE APPROVED AND CHECKED BY
FLOOR HELP BEFORE MONEY IS REGISTERED**

Class G Pub. No. 39960

Copyright Office
Of the United States of America
THE LIBRARY OF CONGRESS
WASHINGTON

Certificate of Copyright Registration

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that two copies of the work of art,

named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years for said work has been duly made in the name of

Jan Allen,

30 - Peterboro St.,

Boston, Mass.

Title: Cocker-spaniel in show position.

By Jan Allen, of United States.

Date of publication Mar. 26, 1942

Copies received Mar. 28, 1942

Entry: Class G pub. No. 39960

[SEAL]

C. L. BOUVÉ
Register of Copyrights.

Assignment of Copyright.

CONTEMPORARY ARTS, INC.

Vol. 514 Page 212

ASSIGNMENT

In consideration of one dollar and other good and valuable considerations to me in hand paid by Contemporary Arts, Inc., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, I, Jan Allen by these presents do hereby assign and set over my entire right, title and interest in and to my copyright on (title) Cocker Spaniel in Show Position which was published in (year) 1942 and upon which application for copyright has been filed by me on 26 day of March 1942 together with full and complete rights to manufacture, print, make copies thereof in any and all forms whatsoever, use, sell and further publish said copyright material to the full end of the term for which the said copyright may be granted together with any and all renewals and extensions thereof.

IN WITNESS whereby I hereunto affix my hand and seal this 15th day of June, 1943.

JAN ALLEN.

Witnessed by:

ALAN FOX

45 Center Street

N. Easton Mass

A

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

LIBRARY OF CONGRESS—WASHINGTON

The foregoing assignment of copyright, dated June 15, 1943, and received for record in the Copyright Office on July 8, 1943, has been recorded in the Copyright Office, book 514, page 212, in conformity with the laws of the United States respecting copyrights.

In Witness Whereof, the seal of this Office has been hereto affixed this twentieth day of July, 1943.

RICHARD C. DE WOLF
Assistant Register of Copyrights.

[Seal]

SABIN'S MFG. CO.

GLASSWARE — POTTERY — NOVELTIES

Factory — 1st & Juniper
Versailles
Phone 23848
McKeesport, Pa.

Oct. 31, 1949

F. W. Woolworth Co.
Att. A. Q. Smith, Asst. Secy.
Woolworth Building
New York, N. Y.

Subject: Cocker-Spaniel

Dear Sir:

In regard to your recent letter, I am sorry this was not answered sooner but I have checked quite thoroughly into this matter. We have purchased these molds from a pottery who has been making this dog since 1936.

Please be advised that he states this was copied from a glass dog-made in England. However, he is trying to find the original of this dog and up to the present writing we have been unable to secure this sample. However, we would like to know when this copyright was put into effect.

The amount involved in this matter is rather small as checking through our records we find we have shipped a total of 127 dozen to your stores. This was shipped as follows:

March — 23 dozen

April — 44 dozen May — 60 dozen

Since that time we have not received any orders for this item. In view of the fact that the quantity is so small, we are wondering what the best thing to do in this matter. As soon as I can get further information for you on the original of this dog, I will write you.

Please let us know what we can do on this matter. We will go along with you and assume all cost regarding any damage or expense connected therewith.

Very truly yours

SABIN'S MFG. CO.

SAM SABIN

SS:ds

F. W. WOOLWORTH CO.

Executive Office
Woolworth Building
New York 7, N. Y.

Barclay 7-1000

June 9, 1949

Sabin's Mfg. Company
First St., Versailles
McKeesport, Pa.

Gentlemen:

We have a communication addressed to our 39th Street and Fifth Avenue store in New York, dated May 23rd, from a firm of attorneys known as Dolan, O'Neill & Balch of 85 Devonshire Street, Boston, Mass. in which they advise us that we have a ceramic Cocker-Spaniel in Show Position on our counters which is an infringement of a copyright which is held by their client, the Contemporary Arts, Inc.

They state that this is U. S. Copyright G. Pub. No. 39960 dated March 26, 1942.

We believe the only ceramic Cocker-Spaniel we have in Show Position on our counters is your #301, so we are assuming that they do refer to that item.

We have written to their attorneys, however, under date of June 3rd, asking them to kindly send us a sample of the item in question so that we can see just which item they do refer to.

We have written to Washington for a copy of this alleged copyright and as soon as we have all the facts and it proves to be your item #301, we will advise you further.

Yours truly,

F. W. WOOLWORTH CO.

By: H. H. LINDQUIST

HHL:JW

**Notice of Appeal to Circuit Court of
Appeals Under Rule 73(b).**

[Filed March 27, 1951]

Notice is hereby given that F. W. Woolworth Company, defendant above named, hereby appeals to Circuit Court of Appeals for the First Circuit from the final judgment entered in this action on February 27, 1951.

Attorneys for Appellant,
S/ CLARENCE A. BARNES
S/ DOUGLAS SMERDON
Address: 75 Federal Street,
Boston, Massachusetts

Bond Filed.

(MEMORANDUM: On March 27, 1951, appellant filed the required bond for costs on appeal in the sum of \$250, with Massachusetts Bonding and Insurance Company surety thereon. JOHN A. CANAVAN, Clerk.)

[Filed April 23, 1951]

It is hereby agreed by and between the attorneys for the appellant and the attorney for the appellee in the above-entitled matter that the physical exhibits offered in evidence at the trial in the United States District Court for the District of Massachusetts may be handed up physically to the United States Court of Appeals for the First Circuit, said physical exhibits being numbered as follows:

Plaintiff's Exhibits 1, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

Defendant's Exhibits A, C, D, F and G. And agree that the following exhibits may be printed, Plaintiff's Exhibits 2, 3, 4, 15, Defendant's Exhibit E.

S/ CLARENCE A. BARNES

Attorney for Appellant

S/ CEDRIC W. PORTER

Attorney for Appellee

Approved April 23, 1951.

S/ CALVERT MAGRUDER

Chief Judge

Designation of the Contents of Record on Appeal.

[Filed April 20, 1951]

Appellant, F. W. Woolworth Co., makes the following designation of the portions of the Record, proceedings and evidence to be contained in the Record on Appeal.

1. Relevant docket entries.
2. Complaint filed November 1, 1949.
3. Answer filed November 17, 1949.
4. Stenographic Record of Hearing on Motion held January 9, 1950.
5. Stenographic record or transcript of the proceedings of the trial.
6. Memorandum of Decision filed August 11, 1950.
7. Final Judgment filed February 27, 1951.
8. Notice of Appeal filed March 27, 1951.
8. (a) Stipulation re exhibits being transmitted to Appellate Court without reproduction.
9. The following exhibits received in evidence:
 - (a) Plaintiff's Exs. Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.
 - (b) Defendant's Exs. A, C, D, E, F, G.

Appellant proposes to hand up to the United States Court of Appeals for the First Circuit, the original physical exhibits, consisting of the following:

Plaintiff's Exhibits 1, 5, 6, 7, 11, 12, 14.
Defendant's Exhibits A, F, G.

Appellant also proposes to hand up to said Court the following exhibits:

Designation of the Contents of Record on Appeal 261

Plaintiff's Exhibits 8, 9, 10, 13.

Defendant's Exhibits C, D.

Appellant proposes to print in the Record on Appeal the following exhibits:

Plaintiff's Exhibits 2, 3, 4, 15.

Defendant's Exhibit E.

Dated April 20, 1951.

BARNES, MAKRAUER & SMERDON

By S/ CLARENCE A. BARNES

Attorneys for Appellant

75 Federal Street

Boston, Mass.

[MEMORANDUM: Orders of enlargement of time for docketing case to and including June 25, 1951, are here omitted. JOHN A. CANAVAN, Clerk.]

Clerk's Certificate.

I, John A. Canavan, Clerk of the United States District Court for the District of Massachusetts, do hereby certify that the foregoing is a true copy of the matter designated by the parties and constitutes the record on appeal in the cause entitled:

No. 8771 Civil Action.

CONTEMPORARY ARTS, INC.,
Plaintiff,

v.

F. W. WOOLWORTH COMPANY,
Defendant.

in said District Court determined.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Boston in said District, this 29th day of May, 1951.

[SEAL]

JOHN A. CANAVAN, *Clerk.*

STATEMENT OF POINTS BY APPELLANT

[FILED IN COURT OF APPEALS JUNE 29, 1951]

A statement of the points upon which the defendant-appellant, F. W. Woolworth Co., intends to rely upon this appeal is as follows:

1. It was error, in fact and in law, for the District Court to find and hold that plaintiff's copyright (Plaintiff's Exhibit 3) on the work of art entitled "Cocker-spaniel in show position" published March 26, 1942, was infringed by the defendant.

2. It was error, in fact and in law, for the District Court to find and hold that the ceramic models of a cocker-spaniel in show position sold by the defendant (Plaintiff's Exhibit 1, and Defendant's Exhibit A) were or could be copied from or were copies of the plaintiff's copyrighted work of art, or any valid reproduction thereof.

3. The District Court committed error in failing to find and hold that the model of the ceramic cocker-spaniel sold by the defendant was conceived, designed, manufactured, produced and commercially sold as early as 1938, and anticipated by at least four years the designing, manufacturing, sale and publication of plaintiff's said copyrighted work of art.

4. The District Court erred in not finding and holding that the work of art entitled "Cocker-spaniel in show position" referred to in plaintiff's copyright registration and the ceramic cocker-spaniel sold by the defendant were essentially dissimilar and were conceived, designed and produced independently by different persons at different times and places.

5. The District Court erred in failing to find and hold that the model or replica of the cocker-spaniel (Defendant's Exhibit F) bearing the legend "A. M. Co. 1938" was not authentic in every respect, including the legend of its date. .

6. The District Court committed error in awarding plaintiff statutory damages in the amount of \$5,000.

7. The District Court erred in awarding plaintiff an attorney's fee of \$2,000.

8. The District Court erred in not dismissing the plaintiff's complaint with costs to the defendant and in not making an award to the defendant for attorneys' fees.

9. The findings of fact of the District Court, as set forth in its memorandum of decision, are clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure, and it is apparent from the entire evidence that a mistake has been committed herein by the District Court.

10. The District Court committed prejudicial error in the admission and exclusion of evidence.

11. The District Court erred in excluding on rebuttal, the evidence offered by the defendant F. W. Woolworth Co. through Prof. Voss of M. I. T. to substantiate the authenticity of the 1938 model (Defendant's Exhibit F).

12. Defendant did not receive a fair and impartial trial in the District Court. The District Judge was prejudiced against the defendant throughout, which prejudice was manifested by his remarks on a preliminary hearing held on January 19, 1950, by his examination and cross examination of the witnesses of the respective parties and by his

rulings and remarks during the trial. The plaintiff's attorney made highly prejudicial and unfair remarks concerning the defendant which, also, prevented a fair trial.

13. The District Court erred in not finding and holding that the ceramic cocker-spaniel sold by defendant and manufactured by Lepere Pottery Company was an exact copy or reproduction of an original cocker-spaniel sculpture created and made by Harry Moyer for Burley Pottery Company at Zanesville, Ohio, in 1938, and that said Burley Pottery Company manufactured and sold copies thereof during that year.

14. The plaintiff failed to prove the work of art referred to in its Certificate of Copyright Registration (Plaintiff's Exhibit 3) and failed to offer or produce upon the trial or identify accurate copies of either one of the two copies of said work of art deposited in the Copyright Office on March 28, 1942.

15. There was no proof that the three cocker-spaniel models offered by the plaintiff on the trial, each of varying color, size and composition and appearance (Plaintiff's Exhibits 5, 6, 7), were in fact the work of art referred to in said Registration of Copyright as having been copyrighted and deposited.

16. Plaintiff has no exclusive right to or any monopoly in the subject of a cocker-spaniel in show position in a sculpture, or otherwise, as the decision of the Court below, in effect, holds.

17. The Court misconstrued the copyright laws of the United States (Act of March 4, 1909, as amended, Title XVII, U. S. C., Sec. 65), in allowing plaintiff a monopoly in the reproduction of a sculpture of a common type or breed of dog—cocker-spaniel—in a standard position—show position.

18. The Court misconstrued the copyright laws of the United States (Act of March 4, 1909, as amended, Title XVII, U. S. C., Sec. 65), in allowing plaintiff a monopoly of a sculpture because of a determined similarity between plaintiff's and defendant's sculpture in preliminary stages of manufacture and before completion.

19. The Court erred in not giving proper weight to evidence introduced by the plaintiff that the defendant's cocker-spaniel had been made since 1936 (Plaintiff's Exhibit 15).

20. The final judgment and the memorandum of decision of the District Court are contrary to the evidence and to the law justifying a reversal thereof and either a dismissal of the complaint or, at least, a new trial.

Dated: June 29, 1951.

BARNES, MAKRAUER & SMERDON,

By CLARENCE A. BARNES,

Attorneys for Defendant-Appellant,
75 Federal Street,

Boston 10, Massachusetts.

[fols. 267-268] PROCEEDINGS IN COURT OF APPEALS

On September 27, 1951, the following stipulation was approved and filed:

STIPULATION

The parties hereto stipulate that since Plaintiff's Exhibit 12, which was first marked for identification only, was omitted from the stipulation (Record page 259) of the physical exhibits which will be handed up to the Court, and this same omission appearing twice in the Designation of the Contents of Record on Appeal (Record page 260), it is hereby stipulated that said Exhibit 12 should be among these listed at 9(a) and also among those which appellant proposes to hand up.

(S.) Clarence A. Barnes, Attorney for Defendant, Appellant. (S.) Cedric W. Porter, Attorney for Plaintiff, Appellee.

Approved. (S.) Calvert Magruder, Chief Judge. 27 Sept. '51. (Seal.)

On October 4, 1951, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

On December 26, 1952, the following opinion of the Court was filed:

[fol. 269] UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT, OCTOBER TERM, 1951

No. 4584

F. W. WOOLWORTH COMPANY, Defendant, Appellant

v.

CONTEMPORARY ARTS, INC., Plaintiff, Appellee

Appeal from the United States District Court for the
District of Massachusetts

[93 F. Supp. 739]

Before Magruder, Chief Judge, and Woodbury and
Hartigan, Circuit Judges

Kenneth v. Greenawalt, with whom Clarence A. Barnes,
Martin A. Schenck, Barnes, Makrauer & Smerdon, and
Davies, Hardy, Schenck & Soons were on brief, for appel-
lant.

Cedric W. Porter, with whom Harry F. R. Dolan, and
Heard, Smith, Porter & Chittick were on brief, for appellee.

OPINION OF THE COURT—December 26, 1951

WOODBURY, Circuit Judge:

This is an appeal from a judgment for the plaintiff in a
suit for infringement of copyright.

In 1942 Elizabeth Philbrick, now Mrs. Glenn C. Hall,
using the professional name of "Jan Allen," applied for
and received a certificate of copyright registration for a
[fol. 270] sculptured work of art entitled "Cocker-spaniel
in show position." The certificate gives the date of publi-
cation as March 26, 1942; the date when copies were re-
ceived as March 28, 1942, and the Entry as Class G pub.
No. 39960. In June 1943 "Jan Allen" assigned all her
right, title and interest in the copyright to the plaintiff-
appellee, Contemporary Arts, Inc., a Massachusetts cor-
poration engaged in the business of manufacturing and
selling small sculptured figurines of various kinds and also

statuettes of many different breeds of dogs which are said to be highly authentic even to the minutest detail. Among the items in the second category it manufactured and sold, from 1942 (when it had commissioned "Jan Allen" to do her work) until the date of the alleged infringement complained of herein, three models said to embody the copyrighted work, all reproductions of which bore notice of copyright in the statutory form. One of the embodiments relied upon is a buff colored plaster model about nine inches long by seven inches high which sold at retail for \$4.00; another is a slightly smaller (about eight by six inch) red porcelain model which sold at retail for \$9.00, and the third is a hand painted black and white porcelain model which retailed for \$15.00.¹

The infringement charged was the sale at retail for \$1.19 by F. W. Woolworth Co., a Pennsylvania corporation operating a nation-wide chain of stores, of ceramic models of a cocker spaniel said to be essentially the same as the copyrighted work. It appears and is not disputed that the Woolworth Co. bought 127 dozen of the accused statuettes from the Sabin Manufacturing Company, a partnership of McKeesport, Pennsylvania, in March, April and May, 1949, for \$.60 apiece, and that Sabin in turn had purchased the [fol. 271] statuettes from the manufacturer, Lepere Pottery Co., another partnership, of Zanesville, Ohio. At the outset of the trial counsel for the defendant informed the court that Sabin was openly assisting the defense since he had the real financial interest therein because of an indemnification agreement with the Woolworth Co., and that the latter, although recognizing its primary liability, if there was any, was "here simply to watch the proceedings."

The principal issue at the trial, which was hotly contested, was that of infringement. And this issue the court below resolved against the defendant. After detailed consideration it reached the ultimate conclusion that "the plaintiff's copyright has been infringed by the defendant's sale of ceramic models copied from the plaintiff's sculpture." Then, regarding an injunction as unnecessary under

¹ Contemporary Arts, Inc., apparently also manufactured and sold a black porcelain model.

the circumstances, the court awarded the plaintiff \$5,000 statutory damages in lieu of actual damages and profits, a \$2,000 attorney's fee, and costs.

The appellant's first contention is that Contemporary Arts has wholly failed to establish any basis for a claim of copyright infringement by failing to show which, if indeed any one, of the three models it manufactured and sold was a copy of the model upon which the copyright certificate was issued. The argument is that since the three models differ from one another, only one at the most could possibly be the copyrighted dog, and the plaintiff has failed to prove which one this was. We regard this contention as without merit for the reason that it rests upon a misconception of the nature of the protection afforded a work of art by copyright.

It is the well established rule that a copyright on a work of art does not protect a subject, but only the treatment of a subject. *Stephens v. Howells Sales Co. Inc.*, 16 F. 2d 805, 808 (1926). The proposition was elaborated by Mr. [fol. 272] Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 249, 250 (1903), wherein with respect to cromolithographs of a circus scene prepared for advertising purposes he said: "But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. *Blunt v. Patten*, 2 Paine, 397, 400. See *Kelly v. Morris*, L.R. 1 Eq. 697; *Morris v. Wright*, L.R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright . . ." Here the "something irreducible" which was "Jan Allen's" alone was certainly not a matter of subject, nor was it a matter of size or material, nor even of color, for it is well known that cocker spaniels are typically of several colors. Her "something irreducible" was shape. This does not mean stance, for show position in a dog is a standardized, stylized position which anyone is

free to reproduce. It means the proportion, form, contour, configuration, and conformation, perhaps the latter in details too subtle for appreciation by anyone but a fancier, of the dog represented by the sculptured work of art. And in these respects the plaintiff's three models are exactly alike except for the elimination in the two higher priced models of undercuts, so called, which was required by the mechanical technique of casting in porcelain and other ceramic clays from a plaster master model.

It appears from the undisputed testimony and the findings of the court in accordance therewith that the first step [fol. 273] in the manufacture of statuettes, such as those with which we are here concerned is to fashion a soft plasticene model, and the second is to make a plaster mold from that soft model. In removing the mold the original model is necessarily destroyed. The cavity of the plaster mold is then filled with a durable plaster, and after this hardens the plaster mold is chipped away, and in its turn destroyed, so that the hard plaster model becomes the master copy from which rubber production molds are made. These rubber molds are used in the production of the plaster copies, but they cannot be used to produce ceramic copies. The reason for this is that ceramic copies must be cast from plaster molds, and this requires some modification of the master copy because plaster molds, unlike flexible rubber molds, cannot be pulled away from undercuts. To meet the demands of production in ceramic, therefore, undercuts in the master copy are filled in and eliminated, but in doing so every effort is made to retain the original conception of the artist insofar as possible. Both plaster and porcelain copies are dried and sprayed with paint after the casting process, and the porcelain copies are given a glaze finish which is baked on at a high temperature with the result that more shrinkage occurs in them than in the plaster models. The quality of the ceramic used also seems to bear some relation to the degree of shrinkage.

It is evident from the foregoing that the elimination of undercuts from the plaintiff's two porcelain models, and also their smaller size, are merely factors of the mechanical process of reproduction in ceramics which have no appreciable significance upon the artistic conception of the work. We therefore regard the differences between the

plaintiff's plaster and its ceramic reproductions in size, and in the elimination in the latter of undercuts, as incon- [fol. 274] sequential so far as the coverage of the copyright is concerned.

Thus when counsel for the plaintiff early in the trial offered samples of the three above mentioned Contemporary Arts models of cocker spaniels in show position, as, he said, "embodying the copyrights in suit," and the samples were marked as exhibits without any objection, all concerned in the trial were entirely correct in regarding, as they did from then on, the differences between the samples as without bearing on proof of copyright. Furthermore the statement made by counsel in offering the samples as exhibits, which was corroborated later by testimony, to the effect that the samples embodied the copyrighted dog is enough to establish the plaintiff's *prima facie* case for there is no evidence whatever, and we certainly are not going to assume without proof, that the plaintiff fraudulently substituted for its copyrighted dog other spurious ones, and fraudulently placed notices of copyright thereon. *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F. 2d 159, 162 (2 Cir. 1927).

From the foregoing discussion it is also clearly evident that from our allowing the plaintiff's three models of cocker spaniels in show position, diverse as to color, size and materials, and in inconsequentially minor ways as to shape, to stand as embodiments of the plaintiff's copyright, we are not in effect holding that the plaintiff "has a monopoly in the subject of a cocker-spaniel in show position in a sculpture or statuette," as the defendant contends. We conclude, therefore that the plaintiff has adequately established its copyright.

The findings of the court below on the issue of infringement are fully supported by the evidence. There is ample evidence in the record that the plaintiff's dog and the Woolworth one embody the identical intellectual or artistic conception of a dog of the breed involved in show attitude. Moreover, this evidence is strongly supported by visual comparison. It is true that a dog with short hair on the head, neck and upper two thirds of the body is represented in the plaintiff's statuettes, whereas the dog in the Woolworth model is represented as having long hair on

the body and neck. This difference, however, is unimportant, for on ample evidence the court below found that the representation of long hair on the Woolworth model could readily have been accomplished, and was in fact accomplished, by etching in wavy lines on a plaster master model made from one of the plaintiff's plaster statuettes. What is highly, if not conclusively, significant of copying is the fact that the plaintiff's and the defendant's statuettes are identical in proportion, and so far as we can see with inexperienced eyes in conformation,² and furthermore the configuration of the curls and folds of the long hair represented on the under body and the feathering represented on the legs of the plaintiff's statuette are shown as asymmetrical, and the defendant's statuette shows the identical lack of symmetry in these respects. Thus there is ample evidence that one model was copied from the other. There also being ample evidence that "Jan Allen" did the original work, in that drawing upon her own intimate knowledge of dogs and after research and consultation with experts, she fashioned a plasticene model of the dog she had in mind from which the plaster master model of the Contemporary Arts dogs was made, it follows that the ultimate finding by the court below of infringement by the defendant by copying the plaintiff's statuette cannot be successfully assailed.

[fol. 276] Other matters, however, remain for consideration and the first of these is whether the court below erred in excluding certain testimony offered by the defendant-appellant in surrebuttal. To understand this question it is necessary to state the defendant's case in some detail.

The defendant's primary defense was that the ceramic statuette of a dog which it had sold was not copied, directly or indirectly, from the plaintiff's copyrighted work of art, but was reproduced from a statuette independently sculptured by a craftsman named Moyer, using his own pet

² The plaintiff's expert witness and the defendant's expert disagree on this, but visual inspection leads us to agree with the court below that the plaintiff's expert was correct. At any rate, we cannot say that the court below was "clearly erroneous" in accepting the testimony of the plaintiff's expert on this point.

spaniel of English type as the model, in 1938 when he was working for a pottery company in Zanesville, Ohio, which later burned and went out of business. In support of this defense Moyer took the stand and testified to his making a model of a cocker spaniel under the circumstances outlined above, and then produced a grey plaster statuette which he identified as his, or a replica of his, which he said he found in 1945 or 1950, (his testimony as to the date was vague) with a set of dies and molds from which to make it, in the store-room of the Lepere Company, for which he went to work after the pottery company for which he worked when he made the model closed its doors. He did not know definitely how, or under what circumstances, the statuette, molds and dies came into Lepere's possession, but he said the Woolworth dog was made from his model, as seems evident from inspection. Etched on the bottom of the model appears the legend "AMCO 1938" the presence of which, however, neither Moyer nor any other witness was able to explain.

To refute Moyer's testimony, which the court below found vague and "difficult to believe" and said it could not "give credence to," the plaintiff in rebuttal called its general manager back to the stand who said that he could not tell the age of Moyer's model by inspection of the [fol. 277] plaster of which it was made, but that the wavy lines on it to represent long body hair and the legend "AMCO 1938" could readily at any time have been scratched on a wet plaster model made from the plaintiff's plaster statuette, and that the appearance of age exhibited by Moyer's model could have been achieved by washing it when it was dusty and dirty, which Moyer said he had done when he found his model in order to clean it. Then, to rebut this testimony, the defendant in rejoinder offered an expert witness to testify that he could tell the age of plaster by inspection, and that Moyer's model was as old, or approximately as old, as the date which it bore. The court rejected this proffered testimony on the ground that it should have been offered as part of the defendant's case in chief and came too late in surrebuttal.

The permissible range of testimony offered in rejoinder, or surrebuttal, as it is sometimes called, is to a large extent discretionary with the trial court. Ordinarily at that

late stage in a trial only evidence to explain away new facts brought forward by the proponent in rebuttal, or evidence to impeach witnesses who testified in rebuttal, is properly admissible. Otherwise orderly presentation, and hence clarity, would bow to the convenience, or even whim, of counsel, and afterthoughts, with consequent confusion, would be encouraged at the expense of thorough preparation by counsel in advance of trial.

The surrebuttal testimony offered by the defendant and refused admission by the court does not fall squarely into either one of the two classes of evidence ordinarily admissible in rejoinder enumerated above. The age of Moyer's model was in issue from the beginning for it was offered as the master copy from which the Woolworth dog was made, which indeed it appears to be, and as antedating the copyrighted work of "Jan Allen." Thus the defendant should [fol. 278] have anticipated that the plaintiff would offer evidence in rebuttal to show that Moyer's model was not as old as the date on it would seem to indicate by putting on a witness to testify that the date, like the wavy hair lines, could readily at any time after casting have been inscribed on a moistened plaster copy of the plaintiff's plaster model.

If the defendant had wished to buttress Moyer's testimony as to the age of his plaster model by the testimony of its expert, it could certainly have done so as part of its defense in chief. Having chosen instead to wait until surrebuttal to offer its evidence, it gambled on a favorite discretionary ruling by the court, and having lost, it can hardly be heard to complain. Nor does the testimony offered by the defendant in surrebuttal tend to impeach the plaintiff's rebuttal witness for the latter did not say that no one could tell the age of plaster by inspection but only that he was unable to do so.

The next matter for consideration is the appellant's contention that the court below erred in awarding the plaintiff-appellee statutory damages in the amount of \$5,000 and a \$2,000 attorney's fee. We dispose of the matter of the attorney's fee with the bare comment that the court below in making its award committed no error of discretion that we can see. The substance of the appellant's argument

on statutory damages can be briefly stated. It says that by affirmatively establishing without objection by the plaintiff a gross profit of \$.59 per dog, (it ignored possible deductions for dogs not sold, selling costs, etc. which it did not bother to show) it absolutely precluded any assessment of statutory damages under the "in lieu" clause of § 25(b) of the Copyright Act of 1909 (35 Stat. 1081), as amended by the Act of 1912 (37 Stat. 489) and enacted into law by the Act of 1947 (61 Stat. 661; 17 U.S.C. § 101(b)), quoted [fol. 279] in material part in the margin,³ leaving as the only alternative an award of profits computed by multiplying the gross profit on each dog by the number of dogs involved, or \$899.16.

The argument is fundamentally fallacious for the reason that it rests upon the not uncommon confusion of profits with damages, both of which are recoverable in copyright cases, but which are nevertheless distinct items of recovery and are awarded on quite different principles. Damages are awarded to a copyright proprietor on the conventional legal principle of affording compensation in money for the harm inflicted upon him by the wrongful act of the infringer, whereas an infringer's profits from his wrongful act are awarded to the copyright proprietor, not to inflict punishment on the infringer, but as appropriate equitable relief incident to a decree of injunction in order to prevent the infringer's unjust enrichment. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); *Sammons v. Colonial Press*, 126 F. 2d 341, 344, 345 (1st Cir., 1942), and cases cited.

It is true that there is language in the cases relied upon

³ "If any person shall infringe the copyright . . . such person shall be liable: . . . To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just [within a minimum limit of \$250 and a maximum limit of \$5,000] and shall not be regarded as a penalty."

by the appellant,⁴ which taken out of context, seems to lend support to its argument that proof of actual profits precludes the assessment of statutory damages under the "in lieu" clause. The language of this court in *Sammons v. Colonial Press*, 126 F. 2d 341, 350 is typical, wherein, with citation of cases, this court said: "No evidence of actual damages having been given, if Colonial Press made [fol. 280] no profits for which it is accountable the assessment by the district court under § 25(b) of statutory damages against Colonial in the minimum amount of \$250 cannot be reviewed upon appeal. However, if the district court finds after further hearing upon remand that Colonial Press made profits for which it must account, the amount of such profits will be the measure of recovery, and it will no longer be permissible to decree statutory damages 'in lieu of actual damages and profits.' "

It is of primary significance to note, however, that in the *Sammons* case, as well as in the cases cited therein and in those upon which the appellant relies, it is made clearly to appear that there was no issue of the plaintiff's damages, the only recovery sought, or the only recovery available on the evidence, being the infringer's profits. Since there was no question of damages in those cases, the language used therein is entirely accurate, for when no damages are recoverable to permit a recovery under the "in lieu" clause of profits in excess of the amount of the actual profits clearly established by the evidence would be to use the "in lieu" clause for the imposition of a penalty which the statute categorically forbids.⁵ In the case at bar, however,

⁴ Principally *Davilla v. Brunswick-Balke Collender Co.*, 94 F. 2d 567 (2nd Cir. 1939); *Sammons v. Colonial Press*, 126 F. 2d 341 (1st Cir. 1943); *Washington Pub. Co. v. Pearson*, 140 F. 2d 465 (D.C. Cir. 1944); *Malsed v. Marshall Field & Co.*, 96 F. Supp. 372 (D.C. Wash. 1951).

⁵ Furthermore, in the *Sammons* case, *supra*, the plaintiff took an appeal on the ground that it was error to give judgment merely for the minimum statutory damages of \$250 when, as plaintiff contended, the evidence showed that the infringer had made actual profits considerably in excess of that sum. This raised an accounting problem as

the plaintiff in its complaint specifically demanded, in addition to an injunction, attorney's fees and costs, both damages and profits in such amount "as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars." That [fol. 281] is to say, it asked for an assessment of both damages and profits by the court under the "in lieu" clause of § 25(b) of the Copyright Act of 1909, *supra*. It maintained this position throughout the trial, insisting that it had suffered damage and that the defendant had made profits, although it made no effort to prove the actual dollars and cents amount of either, and the court below on adequate evidence categorically found both that the plaintiff had suffered damage from the infringement and also that the defendant had made a profit therefrom, but that it was difficult if not impossible for the plaintiff to prove the actual amount of either its damage or of the defendant's profits with the certainty required by law. Thus the case at bar differs radically from those upon which the appellant relies in that here we have a live issue of damages. In this situation it would be illogical to take the language of the cases cited out of context, and use it to support the proposition that proof of actual profits precludes any assessment of damages under the "in lieu" clause whenever an actual profit in some amount has been shown, for recovery under the clause is for both "damages and profits" and those are separate and distinct items of recovery. Moreover to hold that a defendant by proving its profits, which might have been small or even non-existent, could prevent a plaintiff from recovering any damages whatever under the "in lieu" clause, even though he might show that his damage was heavy although incalculable with legal certainty, would

to the allocation of overhead, and we sent the case back to the district court for further determination as to the amount of profit, if any, made by the infringer. Of course, if it should be established with legal certainty that the amount of the infringer's profits, properly computed, exceeded the sum of \$250, plaintiff was entitled to judgment for the larger sum, as we instructed the district court in our opinion.

serve to defeat the purpose of the clause which is to permit recovery of more than a merely nominal sum when, as is not uncommon in these cases, it is difficult or impossible for a plaintiff to prove the actual amount of either damages or profits with the certainty required by law. *Douglas v. Cunningham*, 294 U.S. 207 (1935).

It is true that the defendant by showing its gross profits, [fol. 282] which the plaintiff does not dispute and with which the defendant appears to be content, has made clearly erroneous the district court's finding that profits cannot be determined with legal certainty. Thus any assessment of profits under the "in lieu" clause is precluded. However, deducting profits, which must be taken as \$899.16, from the gross award of \$5,000, leaves \$4,100 and odd cents attributable to damages. Since this is not an irrational amount to award as damages, and the gross award is within the statutory limits, the assessment is not to be disturbed on appeal. *Douglas v. Cunningham*, *supra*.

The final contention of the appellant for our consideration is that it did not receive a fair and impartial trial in the court below, and for that reason the case should be remanded for a new trial before another judge. In support of this contention the appellant points to several instances in the record of irrelevant and prejudicial comments and remarks by counsel for the plaintiff, and also to instances of like remarks by Judge McCarthy who presided at the trial.

It seems to us that appellant is somewhat hypercritical in its objection to certain remarks by plaintiff's counsel, prompted perhaps by excess of zeal in a hotly contested trial, particularly in view of the fact that the trial was not before a jury, and that usually, when plaintiff's counsel made comments to which opposing counsel took exception, the court remarked that it would not heed any prejudicial matter thus interjected.

As to the criticisms of the trial judge, we are bound to say that certain of his remarks in the course of the proceeding were both unseemly and uncalled for. It is the duty of the trial judge not only to afford the parties a fair trial, but also to conduct the proceedings with such poise and dignity and evident impartiality that, so far as is reasonably possible, the parties may leave his courtroom

[fol. 283] with a feeling that they have been given a fair trial. But after careful consideration of the record as a whole we have concluded that the particular remarks of the judge which would better have been left unsaid, and are better not quoted, do not rise to the seriousness of reversible error. Having regard for the convincing nature of the plaintiff's proof, and the unconvincing nature of that of the defendant, we do not feel that the decision reached by the court below can be attributed to bias and prejudice. That is to say, we feel that the defendant really had a fair and impartial trial.

The judgment of the District Court is affirmed, with the addition of an attorney's fee of \$500 to counsel for the plaintiff-appellee for services on this appeal.

On the same day, December 26, 1951, the following judgment was entered:

JUDGMENT—December 26, 1951

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed, with the addition of an attorney's fee of \$500.00 to counsel for the plaintiff-appellee for services on this appeal.

By the Court:

(S.) Roger A. Stinchfield, Clerk.

[fol. 284] Thereafter, to wit, on January 11, 1952, mandate issued.

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1951

No. —

F. W. WOOLWORTH Co., Petitioner,

vs.

CONTEMPORARY ARTS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—March 22, 1952

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 24th, 1952.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 734

F. W. WOOLWORTH COMPANY, Petitioner,

vs.

CONTEMPORARY ARTS, INC.

ORDER ALLOWING CERTIORARI—Filed June 2, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, limited to the question presented by the application of Section 101(b) of Title 17 of the United States Code to this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~24~~ 42

F. W. WOOLWORTH CO.,
Petitioner,

against

CONTEMPORARY ARTS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED
STATES COURT OF APPEALS, FIRST CIRCUIT, AND
BRIEF IN SUPPORT THEREOF

MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
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One Wall Street,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No.

F. W. WOOLWORTH Co.,
Petitioner,

against

CONTEMPORARY ARTS, INC.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT**

Petitioner, F. W. Woolworth Co., prays that, in the above-entitled case involving the meaning and application of stated sections of the Copyright Act, a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals, First Circuit, filed December 26, 1952.

Opinions Below

The opinion of the First Circuit Court of Appeals (R. 268-280) is reported in 193 F. (2d) 162. The memorandum of decision of the District Court (R. 15-25) is reported in 93 F. Supp. 739.

Statutes Involved

The pertinent statutory provisions are Sections 1, 7, 13 and 101(b) of the Copyright Act (17 U.S.C.). So far as relevant, said statutes are printed in Appendix A, *infra*, pages 25-7.

The Basis Upon Which It is Contended That This Court Has Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Rule 38, paragraph 5(b) of the Revised Rules of the Supreme Court of the United States.

The opinion of the First Court of Appeals was rendered and its judgment sought to be reviewed was entered, on December 26, 1951. Petitioner's time to file this petition has been extended, by order, to and including April 24, 1952.

Summary Statement of the Matter Involved

The United States Court of Appeals for the First Circuit has unanimously affirmed a judgment against defendant, petitioner herein, rendered after trial in an action in equity brought under the Copyright Act of the United States for alleged infringement of copyright on a "work of art" entitled "Cocker-spaniel in show position" published March 26, 1942, two copies thereof having been deposited in the Copyright Office on March 28, 1942 (Pl. Ex. 3; R. 252).

Plaintiff's copyright (R. 252), as the registration certificate shows, was not on a "model or design for work of art" but on a published "work of art".

The complaint alleged (R. 6) that defendant had infringed plaintiff's copyright "in said sculpture and work

of art" by reproducing and selling copies and reproductions thereof. The alleged infringing article was a ceramic statuette of a cocker-spaniel dog in show position, marked in evidence as "Plaintiff's Exhibit 1" and "Defendant's Exhibit A" (R. 28-9).

(Parenthetically it should be noted that defendant disclaimed infringement on the ground that the ceramic dog statuette sold by it (Pl. Ex. 1; Def. Ex. A) was not copied, directly or indirectly, from plaintiff's work of art copyrighted in March 1942, but was, in fact, an exact copy and reproduction of a cocker-spaniel statuette designed and modeled independently and earlier, in 1938, by a designer and craftsman named Moyer while in the employ of Burley Pottery Co. of Zanesville, Ohio, which company, in that year, manufactured and sold dog statuettes of that design and model. Defendant offered in evidence an exact plaster reproduction of the Moyer dog bearing the imprinted date "1938" (R. 135, 148-9; Def. Ex. F), but the District Court (whose hostility to defendant was manifested throughout (Cf. R. p. 11) and recognized by the Circuit Court (R. 279-80)) over defendant's objection and exception excluded testimony which would have confirmed Moyer's uncontradicted oral testimony and the age, authenticity and date of said plaster reproduction (R. 181, 202, 229, 231-40)).

On the trial, plaintiff did not offer in evidence, or in any way prove, any dog sculpture or statuette claimed to be a duplicate or copy of the work of art upon which the copyright had been obtained, but offered (as "embodying the copyright") three dog statuettes which each differed from the other but which were all claimed to be protected under that one copyright (R. 31, 50). These differences the plaintiff affirmatively proved in detail because it had alternative theories as to the manner in which defendant's supplier had made the claimed infring-

ing dog: i.e., either by cutting down its larger plaster dog (Pl. Ex. 5; R. 101, 105, 109) or by building up, with plasticine, one of its two smaller porcelain dogs (Pl. Ex. 6, 7; R. 105).

Plaintiff's statuette dog, Exhibit 5, is of buff colored plaster with a spot of black on the muzzle and on each eye. It is made from a rubber mold (R. 53). There is no "demarcation" to define mouth, nose and eyes (R. 64). It sold for \$4 (R. 55). Plaintiff's statuette dog, Exhibit 6, is of red porcelain. Plaintiff's statuette dog, Exhibit 7, is of black and white porcelain. (These three exhibits were received in evidence at page 31 of the Record).

The porcelain dogs were not made from rubber molds but from plaster molds which necessitated elimination of "undercuts", and resulted in some additional alterations in the characteristics of the dog (R. 56, 61, 67, 68). The porcelain dogs are noticeably smaller than the plaster dog (R. 54).

The plaster dog is not glazed. The porcelain dogs are glazed twice and hand painted between glazes. Plaintiff's witness testified "We apply to our ceramic dog a further treatment of hand detail over the body of the glaze" and it is fired again so that the second glaze is absorbed into the first glazing (R. 54). "We apply hand detail in the eyes and on the nose" (R. 55). It requires considerable care and is "all entirely different from the coloring of the rest of the dog" (R. 56). "We would take care of the facial expression and detail in that second glazing * * * the black nose, the mouth and the eyes and so forth" (R. 61). The paint is extremely difficult to work with and to give expression to eyes, nose and muzzle (R. 56).

The black and white porcelain dog has elaborate black, handpainted markings or spots skillfully indicating fur

over body, legs, ears, flanks and muzzle. The eyes are lively reddish brown with black pupils and a highlight. It sold for \$15 (R. 57).

The Court below in its opinion (R. 269) summarized some of these differences between plaintiff's dogs:

"One of the embodiments relied upon is a buff colored plaster model about nine inches long by seven inches high which sold at retail for \$4.00; another is a slightly smaller (about eight inches by six inches) red porcelain model which sold at retail for \$9.00 and the third is a hand-painted black and white porcelain model which retailed for \$15.00"

The Court below (R. 270-1), through what seems to us a drastic extension of the subject matter of copyright in respect of a statuette as a work of art, has recognized the right of the copyright holder (after copyright and without new copyright) to change at will the size, material, appearance and even the color of the statuette providing the shape is generally preserved, stating: "This does not mean stance, for show position in a dog is a standardized, stylized position which anyone is free to reproduce. It means the proportion, form, contour, configuration, and conformation, perhaps the latter in details too subtle for appreciation by anyone but a fancier, of a dog represented by the sculptured work of art."

The trial court awarded plaintiff statutory damages and the maximum amount thereof, at \$10 a copy for the first five hundred copies, under the erroneous impression that, apart from and irrespective of any proof as to plaintiff's actual damages or defendant's profits it could award such statutory damages once infringement is found. The trial court was under the misapprehension that there was a fixed yardstick of statutory damages in such a situation, to wit, \$10 per copy sold by defendant up to

the maximum amount of \$5,000, and, also, that, at plaintiff's election, it could award statutory damages in place of actual damages or profits (R. 77, 111, 113-4, 119-21, 248).

Plaintiff, from the trial's commencement, was interested in statutory damages. It made no attempt to prove any sales in its three different appearing and priced dogs at the time of or subsequent to the claimed infringement, and did not show that at that time it was selling the dog actually copyrighted or what the price of that dog was.

Defendant's profits were affirmatively proved with mathematical certainty at 59¢ on each of the 1524 dogs sold by it, or \$899.16. Defendant had given its supplier only one, original, trial order for the alleged infringing dogs in January 1949, which order was filled by deliveries to thirty-four Woolworth stores, only, in March, April and May, 1949 (R. 73-4, 123; Pl. Ex. 13). Woolworth ordered and purchased no more of such dogs thereafter (R. 74, 132). Defendant paid a price of 60¢ apiece and sold each piece for \$1.19, resulting in a profit on each piece of 59¢ (R. 73).

It was conceded that Woolworth knew nothing of plaintiff's article or copyright at the time (R. 76).

The Court below recognized that defendant's claim of error in respect of the award of statutory damages had support in the language of some of the cases "taken out of context" and that the findings of the District Court in certain respects were "clearly erroneous" but affirmed because, it held, the gross award was within the statutory limits (R. 276-7, 279).

The decision below allows a copyright holder of a work of art to change such work of art in all respects involving appearance save as to shape (wherein the continuity may be too subtle for all save the expert). The copyright

holder may nevertheless stamp his copyright notice on the varied dogs and so give false notice to the public that the changed dogs are also copyrighted. Inasmuch as the decision below specifically sanctions departures from the copyrighted article under the same copyright notice, it will result in the practical nullification and breakdown of any statutory notice of copyright in respect of statuettes. There is a resultant extension of copyright monopoly. Although these "departures" have entered into the matter of statutory damage allowed against your petitioner there is also in respect of statutory damage independent error under another section of the Copyright Act.

The Questions Presented

1. Was it not error for the First Circuit Court of Appeals, on an appeal in a copyright infringement suit, to uphold the District Court's award to plaintiff of maximum statutory damages in lieu of plaintiff's actual damages and defendant's profits, where plaintiff neither proved actual damages nor difficulty or impossibility of proving such actual damages and where defendant's profits were proved with mathematical certainty?
2. Was it not error for the First Circuit Court of Appeals, by a unique method of computation of damages without statutory or judicial sanction in a copyright infringement suit, to allow, on appeal, an award of the precise amount of defendant's profits in addition to statutory damages in an arbitrary amount in order to maintain the exact amount of the District Court's award of maximum statutory damages?
3. Was it not error for the First Circuit Court of Appeals to permit plaintiff to recover, in a copyright infringement suit, without proof of its registered and

deposited statuette work of art and on the basis of three statuette models, all offered by plaintiff as "embodying the copyright", each of which was diverse as to color, size, material, markings, artistry and appearance?

4. Was it not error for the First Circuit Court of Appeals to hold that the "something irreducible" which was covered by plaintiff's copyright on a statuette work of art was shape, perhaps in details too subtle for appreciation by anyone but a fancier, and to recognize the right of the copyright holder, after copyright and without new copyright, to change and alter at will the size, material, appearance and even the color of such work of art provided the shape is generally preserved, and thus to extend the copyright monopoly and protection to such variations and adaptations of the copyrighted work?

Reasons Relied Upon for the Allowance of the Writ

1. The First Circuit Court of Appeals, in its interpretation and application of Section 101(b) of the Copyright Act and particularly the "in lieu" clause thereof, has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter and in probable conflict with decisions of this Court and other Federal Courts (see Point I of annexed brief, *infra*).

2. The First Circuit Court of Appeals has rendered a decision in probable conflict with the applicable decisions of this Court and other Circuit Courts of Appeal and in violation of the provisions of the Copyright Act in permitting plaintiff to recover in a copyright infringement suit without proof of the registered and deposited statuette work of art and on the basis of three statuettes,

each diverse as to color, size, materials, markings, artistry and appearance, and all offered by plaintiff as "embodying the copyright" and in thus permitting an enormous extension of copyright monopoly in the field of a statuette or sculpture copyrighted as a work of art (see Point II of annexed brief, *infra*).

3. The First Circuit Court of Appeals, as to the concept of the nature of the protection afforded by copyright to a sculpture or statuette work of art and as to the application thereof, has decided a novel and important question of Federal Copyright Law which has not been, but should be settled by this Court (see Point II of annexed brief, *infra*).

4. The questions presented here are substantial and of great importance in the interpretation and application of the Copyright Laws of the United States.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the First Circuit in respect of its decision and judgment affirming the judgment of the District Court, District of Massachusetts, for a review thereof by this Court, and for such other relief as to this Court may seem proper.

Dated: New York, N. Y., April 23, 1952.

F. W. WOOLWORTH Co., Petitioner,

By MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
Attorneys for Petitioner.

Certificate of Counsel

We hereby certify that we have examined the foregoing petition for a writ of certiorari and that in our opinion it is well founded and the cause is one in which the petition should be granted.

Dated: April 23, 1952.

MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
Attorneys for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No.

F. W. WOOLWORTH Co.,
Petitioner,
against

CONTEMPORARY ARTS, INC.,
Respondent.

**PETITIONER'S BRIEF IN SUPPORT OF PETITION
 FOR WRIT OF CERTIORARI**

Statement

This brief is submitted in support of the petition of F. W. Woolworth Co. for a review on writ of certiorari of the decision and judgment of the United States Court of Appeals, First Circuit, affirming the decision and judgment of the District Court of the District of Massachusetts.

A statement of the facts and questions raised is set forth in the foregoing petition and the relevant parts of the statutes involved are set forth in Appendix A hereto.

POINT I

The decision below construes the "in lieu" clause of §101(b) of the Copyright Act in conflict with a decision of the Court of Appeals for the Second Circuit and in probable conflict with decisions of this Court and other Federal Courts.

The statutory basis for an award of damages in a copyright suit is set forth in Section 101(b) of Title 17 of the United States Code (formerly Section 25(b)). So far as applicable, the statute is quoted in the appendix at pages 25-6.

Plaintiff did not prove any damages and made no effort to do so. Neither did plaintiff make any showing that it was difficult or impossible to prove actual damages; and no such difficulty or impossibility existed in fact. The subject matter of the alleged infringement, to wit, one specific statuette, unlike a magazine article or story in a newspaper, presented no difficulty as to proof of damage. When given an opportunity by the Court to put in proper proof of damages, plaintiff's counsel stated: "Our reliance was on statutory damages" (R. 182-3). Plaintiff's position throughout was that its reliance was on statutory damages and that it, at its own election, had a right to statutory damages in place of and irrespective of actual damages or profits (R. 34, 182-3, 248). Furthermore, it did not show which of its three offered dog statuettes, if any, it was selling at the time of the claimed infringement. It did not prove or produce a duplicate of its copyrighted "work of art" dog nor did it show that it was selling that dog during, or immediately before the period of alleged infringement or that it sold such dog in the same areas where defendant's dog was sold.

There was precise and mathematically certain and undisputed evidence of defendant's profits from its sale of the alleged infringing article. It was stipulated at the start of the trial and later testified to by the Woolworth buyer that Woolworth had purchased from its supplier as a trial order, 127 dozen dog statuettes which were distributed in 34 only of its stores; that it had paid 60¢ for each one, and had sold them at \$1.19 each for a gross profit of 59¢ per statuette or a total gross profit of \$829.16 (R. 26-27, 73-74).

It was proved, without question, that this trial order had been placed before Woolworth had knowledge of plaintiff's copyrighted work of art or notice of the alleged infringement. Plaintiff conceded Woolworth was "merely an innocent bystander" (R. 76). Woolworth did not, after placing said trial order, purchase or order any more of the alleged infringing dog statuettes (R. 74).

Despite this state of the record, the District Court awarded plaintiff statutory damages in the maximum amount of \$5,000 and made a finding that "it is difficult, if not impossible, for the plaintiff to prove its actual damages and defendant's profits, with the certainty required by the law for recovery of actual damages and profits" (R. 24). The Court of Appeals recognized that that finding was "clearly erroneous" (R. 279) but affirmed that assessment on a novel and recalculated basis which is without statutory sanction.

The District Court decision, and the decision affirming it, are in conflict with the decision of this Court in *Sheldon v. Metro Goldwyn Pictures Corp.*, 309 U. S. 369, 390 (1940), where it was held that the "in lieu" clause was not applicable where profits had been proved and to the rule stated by this Court in *Douglas v. Cunningham*, 294 U. S. 207, 209 (1935), that the statutory damage provision was adopted to afford a copyright owner relief "in a case where the

rules of law render difficult or impossible proof of damages or discovery of profits”.

The decisions, below, also, are contrary to and in direct conflict with the decision of the Second Circuit Court of Appeals in *Davilla v. Brunswick-Balke Collender Co.*, 94 F. (2d) 567 (C.C.A. 2, 1938), cert. den. 304 U. S. 572, where the rule is stated to be that proof of actual profits precludes the recovery of statutory damages and that whether profits or statutory damages are to be allowed is not a matter of choice with the plaintiff. The *Davilla* case was followed by the First Circuit Court of Appeals, earlier, in *Sammons v. Colonial Press*, 126 F. (2d) 341, 350 (C.C.A. 1, 1942), wherein that Court held that the amount of profits, when established, is the measure of recovery and it will then no longer be permissible to decree statutory damages in lieu of actual damages and profits. That, also, has been stated to be the rule in the Ninth Circuit in *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. (2d) 354, 378 (C.C.A. 9, 1947), and has been followed recently in *Malsed v. Marshall Field & Co.*, 96 F. Supp. 372 (U.S.D.C., W.D., Wash. N.D., 1951).

In *Sheldon v. Metro Goldwyn Pictures Corp.*, *supra*, this Court said (p. 399):

“We agree with petitioners that the ‘in lieu’ clause is not applicable here, as the profits have been proved and the only question is as to their apportionment.”

In *Douglas v. Cunningham*, *supra*, this Court said (209):

“The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copy-right some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.”

In *Davilla v. Brunswick-Balke Collender Co.*, *supra*, the trial court affirmed an award of a master of \$5,000 statutory damages. The Second Circuit Court of Appeals held that "actual profits were sufficiently established before the master so as to preclude the recovery of statutory damages", reduced the \$5,000 statutory damages to \$1,057.53, defendant's profits, and stated at page 568:

"Whether profits shall be awarded or statutory damages allowed is not a matter of choice with a plaintiff."

The Court further stated at page 570:

"Since the amount of the sales was sufficiently proved, there was no basis for an award of statutory damages. Such an award should not be based upon the idea of punishment, but depends upon the absence of proof of actual profits and damages."

The recent case of *Malsed v. Marshall Field & Co.*, *supra*, is directly in point. At page 376, the Court said (italics in original):

"The 'in lieu' provision is, as the language of the section states specifically, 'in lieu of actual damages and profits'

"It does not apply where *either* actual damages or profits are ascertainable.

• • • • •

"in order that the 'in lieu' provision be resorted to, there must be difficulty or impossibility of computing *both* damages and profits."

The Court further stated that since profits were proved that was all plaintiff was entitled to, and that to award statutory damages would amount to imposition of a penalty.

In affirming the decision of the District Court herein, the First Circuit Court of Appeals has rendered a decision which is in conflict with an important rule of copyright law set forth in the foregoing decisions. In its decision herein (193 F. (2d) 162), the First Circuit Court recognizes that the District Court's finding that defendant's profits could not be proved or determined was "clearly erroneous" (R. 279) and that the decisions in the above cases (and in others) "lend support" to petitioner's argument that proof of actual profits precludes the assessment of statutory damages under the "in lieu" clause (R. 276-7). It disregarded the above rule of law which it had earlier stated in the *Sammons* case, following the rule stated by the Second Circuit in the *Davilla* case and by this Court in the *Sheldon* case. Instead, it appears (in a confusing statement) to have awarded plaintiff the amount of defendant's profits (\$899.16) plus statutory damages in the purely arbitrary amount of "\$4,100 and odd cents" (R. 279), thus maintaining the gross statutory damage award of the District Court, which had been rationalized on the basis of \$10 a copy for the first 500 copies (R. 25). By a devious process of reasoning and a novel method of calculation the First Circuit Court thus has sought to avoid the rule laid down in these prior decisions and to set up a unique rule of damages which was not intended or expressed in the copyright act and has not been stated or sanctioned, to our knowledge, by this Court or by any other Circuit Court.

The Circuit Court referred to the above cases but attempted to distinguish them on the ground that in the case at bar "plaintiff in its complaint specifically demanded, in addition to an injunction, attorney's fees and costs, both damages and profits in such amount 'as to the court shall appear proper'" (R. 277-8). It is to be noted

in both the *Sheldon* and *Sammons* cases the complaints specifically demanded both profits and damages. Also, herein on the trial plaintiff changed its pleaded position to one of reliance solely on statutory damages, rather than actual damages or profits (R. 182-3, 249). Plaintiff's attorneys, in their brief in the Circuit Court herein, admitted that the *Davilla* case squarely held that where profits were ascertainable, it was improper to award statutory damages, but argued that that case was "simply plainly wrong." (Brief for Appellee at page 42.)

The First Circuit Court in refusing to follow the *Davilla* case on this issue of statutory damages necessitates that this Court resolve the conflict between the two Circuits.

POINT II

The decision below which sanctioned the plaintiff in departures in overall color, material, size and appearance, from its copyrighted work of art violates the provisions of the Copyright Act that infringement may only be of the work registered and is in probable conflict with decisions of this Court and of the Courts of Appeal of other Circuits. The Court below has decided a novel and important question of Federal Law which should be settled by this Court.

Neither Court nor petitioner's counsel have been allowed by plaintiff to see a duplicate of the "work of art" dog on which the copyright was obtained. We speculate and guess on a subject where the statute demands precision. But the three dogs, which were tendered by plaintiff on the trial as all equally "embodying the copyright", are so strikingly different that no subtlety of the sculptor's art can confuse the common sense of the ordinary observer.

The buff colored plaster dog (Pl. Ex. 5) with a black spot for muzzle and two black spots for eyes is a crude affair not worth to our mind the modest price of four dollars. The black and white porcelain dog (Pl. Ex. 7) has its beauty given it by the double glazing with the skillful handpainting (not by Jan Allen, the sculptor, but by employees in plaintiff's shop), which simulates the fur of the dog and gives a lively expression to eyes and face and individuality by mottled black and white to the whole dog, and in our opinion is well worth the \$15. No ordinary purchaser would think that they were the same dog or under the same copyright. In fact, it is from a business standpoint plain that plaintiff after purchasing the copyright from the sculptor, Jan Allen (Pl. Ex. 4; R. 253), attempted to make the copyrighted dog in various models and forms as different as possible to appeal to different or successive markets, to each of which models and forms were added new artistic and copyrightable elements (17 U. S. Code, Sec. 7).

The Circuit Court recognizes the differences between plaintiff's three offered dogs but searches for a common denominator in all of them, in an effort to rationalize and overcome the dilemma presented by plaintiff's proofs. It supposes that a "form" is common to all three. This includes "proportion" (in this respect 9" x 7" being the same as 8" x 6") (R. 269); and "conformation" (to what, not revealed) involving details "too subtle" for common appreciation (R. 272-3). It is this element common to all three dogs and not clearly observable in any, unless at any rate they are all grouped and studied together, which defendant has been held to have infringed—and without the benefit of statutory notice or proof as to the actual dog registered.

An additional burden is cast upon defendant (along with all other merchants) as the result of what, in reality, is an enormous extension of the legalized monopoly which plaintiff (and all other holders of copyrighted statuettes) have been granted by the decision below.

The decision below is in probable conflict with decisions of this Court and also in conflict with the decisions of other Circuit Courts of Appeal which have hitherto refused, in other fields of copyright, such extensions of monopoly under the same or analogous sections of the Copyright Act. Also, the decision below in its statement and conception of the nature of the protection afforded by copyright to a statuette registered as a work of art, and in its application thereof, has decided a novel and important question of Federal Law which should be settled by this Court.

(a) Where the copyright law of February 1831 required deposit of the printed copy of the title of the book, entry of a book called "The Atlantic Monthly Magazine" did not secure copyright of "The Professor at the Breakfast Table" being published in installments therein. This Court held (*Mifflin v. R. H. White Company*, 190 U. S. 260, 264 (1903)) that the public might justly demand that the person claiming a monopoly of publication should pursue the statutory method of procuring it and that the court in determining whether a notice of copyright was misleading was not bound to look beyond the face of the notice.

In *DeJonge v. Breuker*, 235 U. S. 33 (1914), action was to restrain an alleged infringement of a copyright under the law as it was before the act of March 4, 1909. The work was a painting representing sprigs of holly, mistletoe and spruce arranged in the form of an open cluster having substantially the outline of a square. In vending it, however, the complainant reproduced it in repetitions

side by side and above and below—twelve repetitions upon strips of paper having the look of wall paper and intended to be used in wrapping boxes. The notice of copyright was produced on each sheet but not on each reproduction of the painting. Affirming a dismissal of the complaint, this Court held that every reproduction of a copyrighted work must bear the statutory notice. In regard to the suggestion that it was over-technical to require a repetition of the notice upon every square, this Court at page 36 said:

“This argument tacitly assumes that we can look to such larger unity as the sheet possesses. But that unity is only the unity of a design that is not patented. * * * The appellant is claiming the same right as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a Holy Family, or a scene of war.”

In *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1 (1908), this Court held that under the then copyright law, a “copy” of a musical composition was a written or printed record of it in intelligible notation and did not include perforated rolls to be operated in connection with a musical instrument in which they were adapted to produce the same musical notes as represented by the signs on the sheet music. This Court at page 17 stated that the common understanding of the word “copy” was “a reproduction or duplication of a thing” and quoted from an English authority that

“A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original”

and on the same page this Court said that the statute had provided for the making and filing of a tangible thing

“against the publication and duplication of which it is the purpose of the statute to protect the composer.”

In *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339 (1908), this Court, in construing the differences between the patent and the copyright statutes, stated at page 347 that the main purpose of the copyright statutes was to secure to the author “the right to multiply copies of his work”.

Under the Copyright Act (17 U.S.C. Secs. 1, 13; see Appendix A at pp. 25-7) the exclusive right granted is to copy and vend the copyrighted work, as published and deposited.

Changes and alterations in a statuette copyrighted as a work of art, just as changes in a copyrighted book in a second edition, make it a new work and necessitate a new copyright. In a copyright action, plaintiff must prove and depend solely upon the copyrighted version and cannot utilize, under the guise of “embodiments” thereof, uncopyrighted variations.

17 U. S. Code, Sec. 7 (See Appendix at p. 25);

West Publishing Co. v. Edward Thompson Co.,
176 F. 833 (C.C.A. 2 1910);

Bentley v. Tibbals, 223 F. 247, 256, 257 (C.C.A.
2 1915);

Davies v. Columbia Pictures Corporation of California, 20 F. Supp. 809, 810 (D.C., S.D. N.Y.,
1937).

Changes in a photograph as published from the photograph as copyrighted, by “blackouts” of certain portions have been held to make the action for infringement not

maintainable. *Hoyt v. Daily Mirror*, 31 F. Supp. 89. (D.C., S.D. N.Y., 1939).

The divergencies between plaintiff's three dogs were not the subject of any dispute and the legal effects of such differences could not be determined on rulings in regard to evidence. The divergencies of the three were too great for copyright on any one of them, especially when a duplicate of the dog registered was not produced.

The divergencies affirmatively proved a failure of plaintiff to comply with the statutory conditions precedent to maintenance of an infringement suit (*New York Times Co. v. Star Co.*, 195 F. 110 (1912)).

(b) The Court below has set forth a conception of the nature of the protection afforded by copyright to a statuette work of art which is not found in any cited authority. It has held that the "something irreducible" for which such protection is afforded is a matter of "shape" and not a matter of size, material or color. The case of *Bleisten v. Donaldson Lithographing Co.*, 188 U. S. 239 (1903), which involved a copyrighted design of a circus poster, is not an authority for that proposition. There were variations between the infringing work and the copyrighted work. Such variations were not enough to escape infringement. But in the case at bar, for the first time, so far as we have been able to ascertain, the holder of a copyright has obtained judicial approval for the making of variations in his own copyrighted work against the text of the Copyright Act and in extension of his monopoly.

Here is presented a very important question of Federal Copyright law which should be settled by this Court.

The decisions below not only hold, in effect, that the plaintiff has exclusive copyright rights in an unproven work of art entitled "Cocker-spaniel in show position",

as well as in three models of a cocker-spaniel in show position diverse in color, form, aspect, size, materials, artistry, etc., (each stated to "embody" that copyrighted work), but also holds, in effect, that plaintiff has a monopoly in the subject of a cocker-spaniel in show position in a sculpture or statuette.

The cocker-spaniel is a common dog of a particular shape. According to plaintiff's sculptress, her copyrighted work was a "composite ideal dog" based on "a lot of photographs, a lot of dogs"; it was "typical" and "representative" of "the standard of the cocker-spaniel"; she tried to "copy standards"; it was "typical of the times"; not a model of "any one particular dog"; (R. 95, 96, 102, 105, 107, 108). Plaintiff insisted that its dogs were "true" and "realistic" copies of living dogs and "true to type" and "exact" copies of prize dogs generally (R. 32, 85). Thus, their studied effort was to avoid any special treatment, uniqueness or individuality in the subject of their work of art. Ironically, therefore, this is a case where the less individuality there is in plaintiff's copyrighted dog, the broader are its claims of infringement and, under the decision below, the more extensive its granted monopoly.

Manifestly, under the decision below, no one could make or sell a statuette of a cocker-spaniel in a conventional prize position which was not substantially similar, if not identical, in shape, to any one of plaintiff's three models said to embody its copyright, to say nothing of its unproved version which was actually registered in the Copyright Office. Plaintiff is thus afforded a monopoly in breadth as to a work of art never intended by the Copyright Act.

CONCLUSION

It is respectfully submitted, for the foregoing reasons, that the petition should be granted and that a writ of certiorari should issue to the United States Court of Appeals for the First Circuit for a review of its decision and judgment herein by this Court.

Respectfully submitted,

MARTIN A. SCHENCK,
KENNETM W. GREENAWALT,
Attorneys for Petitioner.

APPENDIX A

(Statutory provisions of the Copyright Act cited and quoted, so far as relevant, from Title 17 U. S. Code.)

"§1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right;

(a) To print, reprint, publish, copy, and vend the copyrighted work; * * *

"§7. Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected

Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

"§101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: o

* * * * *

(b) Damages and profits; amount; other remedies.

To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the Court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, * * * and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty."

§13. Deposit of copies after publication; action or proceeding for infringement. After copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign State or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section 15 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduc-

tion provided by section 11 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

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CHARLES ELMORE C. CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 524 42

F. W. WOOLWORTH CO.,
Petitioner,
against

CONTEMPORARY ARTS, INC.,
Respondent.

**PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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KENNETH W. GREENAWALT,
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New York 5, N. Y.

Dated: May 23, 1952.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 734

F. W. WOOLWORTH Co.,
Petitioner,

v.

CONTEMPORARY ARTS, INC.,
Respondent.

**PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Petitioner makes this brief reply to respondent's brief in opposition to the petition.

POINT I

Respondent's arguments are based on a confusion as to the actuality of the profits which it has recovered and as to the discretion permitted courts by the "in lieu" provision of Section 101 (b) of the Copyright Act.

Respondent, at page 6 of its brief, states that "Petitioner did not prove its profits" and, at page 14, asserts:

"Presumably, for instance, the Petitioner here is willing to pay some 2% of its gross profits of \$899.16, or \$17.98."

Respondent then goes on to argue that petitioner did not prove its selling cost, but that if it had, or if it had admitted, "a small amount of actual net profits", those would have been inadequate for plaintiff and the case therefore falls within the rule which respondent, at page 12 of its brief, tenders as usual *i.e.*, that Congress intended statutory damages.

"* * * even though some actual damages or actual profits may be ascertainable, *where they are so small and inadequate that they do not provide an effective remedy to prevent wilful and flagrant piracy.*"

The statute, however, (Section 101(b)), quoted at page 7 of respondent's brief and at page 26 of petitioner's appendix to brief, provides that:

"* * * in proving profits the plaintiff shall be required to prove sales only; and the defendant shall be required to prove every element of cost which he claims. * * *

The amount of the sales are without contradiction in the record. And the defendant, under the burden which the statute placed upon it, proved as the only cost to be deducted therefrom the wholesale cost of the dogs. The gross, actual and recoverable profits were, therefore, not only the subject of precise testimony, but the subject of stipulation (R. 26-27, 73-74). The holding of the trial court that it was difficult, if not impossible, for the plaintiff to prove defendant's profits (which was the trial court's basis for allowing statutory damages; R. 24), was held by the Court of Appeals to be "**clearly erroneous**" (R. 279); and, under its recalculation the respondent has been allowed a recovery of this actual gross profit, and, *in addition*, statutory damages (R. 279).

Respondent further asserts, at pages 7 and 9 of its brief, that Congress gave the District Court entire discretion in any copyright infringement case to award *either* actual damages and profits *or* statutory damages. Actually, the wording of the statute is clear, and has been so construed by this Court, that upon awarding statutory damages discretion is vested in the District Court to assess the amount between the fixed limits of \$250 and \$5,000, and that the District Court is also given discretion whether or not to employ the scheduled amounts suggested by Congress in the statute (*Jewell LaSalle Co. v. Buck*, 283 U. S. 202 (1931); *Westermann Co. v. Dispatch Co.*, 249 U. S. 100 (1918)).

Neither *Douglas v. Cunningham*, 294 U. S. 207 (1935), nor any case cited by respondent holds that a Court may, in its discretion, award statutory damages when *either* actual damages *or* profits have been proved on the trial.

Likewise, the *Cunningham* case did not hold, as respondent argues in its brief (p. 18) that the amount of sales must be proved to serve as a basis for awarding of statutory damages. The sole question presented in the *Cunningham* case was whether under Section 25(b) "an appellate court may review the action of a trial judge in assessing an amount in lieu of actual damages where the amount awarded is within the limits imposed by the section" (294 U. S. 207, 208-9) and this Court held that it could not.

As Mr. Justice Roberts pointed out in the *Cunningham* case, the statutory damages provision was adopted "to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits". If proof of either is made, there is no necessity or basis of awarding statutory damages and to do so would be to

impose a penalty, which the statute clearly prohibits. In the *Cunningham* case neither profits nor damages had been proved. Therein, plaintiff's article had been infringed by its publication, among a multitude of other articles, in 384,000 copies of defendant's Sunday newspaper. Obviously, under those circumstances, it was impossible to determine defendant's profits attributable to that one article.

Respondent's assertion in its brief (p. 18) that *Davilla v. Brunswick-Balke Collender Co.*, 94 F. (2d) 567 (C.C.A. 2, 1938) is contrary to the *Cunningham* case on the theory that a Court awarding statutory damages according to the schedule in the statute cannot be reversed on appeal, is without merit. This theory requires the assumption that a Court under the statute may award statutory damages when profits or damages are proved, and, as has been pointed out, there was no proof of profits or damages in the *Cunningham* case. The *Davilla* case (which respondent claims, at pages 17-18, was "wrongly decided" and "clearly wrong") squarely holds that where profits are proved—in that case as this, by sales—a Court is precluded from awarding statutory damages and to do so would be to use the statute as a punishment.

The right of the Court to use its discretion in making a statutory award, but only after the difficulty or impossibility of proving profits and damages has been determined, saves the statute from being construed as penal. If, as respondent contends, a Court has absolute discretion to award damages and profits or statutory damages, the Court would in many instances, be improperly imposing penalties and giving the statute a penal construction. This would be particularly true if the Court could make statutory awards whenever provable damages or profits are "inadequate" as respondent erroneously urges (pp. 8, 9, 12).

In *Sammons v. Colonial Press, Inc.*, 126 F. (2d) 341 (C.C.A. 1, 1942), the First Circuit Court said that once profits are determined "it will be no longer *permissible* to decree statutory damages", and cited the *Davilla* case, which plaintiff now contends is "clearly wrong" (p. 19).

In *Toksvig v. Bruce Publishing Co.*, 181 F. (2d) 664 (C.C.A. 7, 1950), the Court implied that it was unable to determine defendant's profits but estimated them at between five and ten cents per infringing copy. In finding defendant had sold 14,262 copies, the Court awarded statutory damages of \$1,000 which comes to approximately seven cents per copy, and in all probability at least approximated defendant's profits.

As for the other cases cited by respondent the facts thereof indicate that defendant's profits were not ascertainable, especially in those cases involving infringement by a performance, as distinguished from copying (*Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202), or where the infringing work is simply a portion of a larger work (*Douglas v. Cunningham*, *supra*). In *L. A. Westermann v. Dispatch Printing Co.*, *supra*, the Court at page 104 expressly stated that defendant's profits had not been shown. Respondent's quotation (its brief at p. 14) from this case was taken out of context, as it followed the Court's statement that both parties agreed that statutory damages were applicable, and that it is only then that a Court may consider what is a "just" assessment.

Respondent, in support of its theory of damages, charges defendant with "flagrant piracy" (p. 8) and repeatedly suggests that the infringement has been wilful and deliberate, apparently to justify the penalty which the District Court imposed. As pointed out before, this is contrary to the statute forbidding penalties and also contradicts plaintiff's own concession on the trial that defendant was an "innocent bystander" (R. 76).

Here, where defendant made but one trial order and both the purchase and selling prices were shown, defendant's profits were peculiarly simple to prove. It was not *admitted* that plaintiff was unable to prove its damages (cf. Res. Br., p. 6) and plaintiff offered no proof to show that it was difficult or impossible to prove its actual damages. If any damages may be properly awarded in this case (which petitioner denies), they should be limited to the amount of defendant's profits.

POINT II

Respondent confuses its departures from copyright with infringement.

In the ordinary copyright infringement case, the usual question is in regard to the similarity of defendant's book, picture or statuette with the plaintiff's copyrighted book, picture or statuette. And where it is shown that the defendant had access to plaintiff's work and there is persuasive proof of actual copying, the extent of the similarities may cease to be important.

But the respondent argues that because the court has determined (on emasculated proofs) that petitioner's dog copied respondent's dog, there is no merit in petitioner's contention that respondent departed from its own copyright (Res. Br., p. 19). The two questions are not at all connected.

Respondent, at page 2 of its brief, states that the statuette could be cast in metal if desired. It also states on the same page that in the "models" color was optional. But the situation presented in the case at bar is more extreme than these two questionable generalities would indicate. And there is no factual dispute in respect of

those extremes, inasmuch as respondent in great detail proved them. Color is here used as a matter of distinction; individual marking, facial expression and decoration. The plaster dog has no mouth, nose or eyes, that is, those particular features are not marked in the plaster dog (R. 64), whereas in the black and white porcelain dog the employees in respondent's shop gave it hand detail between the glazes and to the eyes and to the nose, and this facial expression to eyes, nose and muzzle was in an entirely different coloring (R. 54, 55, 56, 61).

Respondent's discussion as to the nature of the copyright monopoly does not absolve it from the obligation of using the copyright notice only on duplications of the specific dog Jan Allen registered. What that dog was has never been proven, but *it is perfectly apparent that it could not be the red plaster dog and the black and white porcelain dog at one and the same time.*

Moreover, in light of respondent's brief, it should be emphasized that plaintiff's copyright was on a "work of art" which was published and deposited as such. It was not on a "model or design for a work of art".

Section 5 of the Copyright Act, which classifies works for registration, provides in subdivision (g) thereof: "Works of art; models or designs for works of art". Under Section 1, subdivision (a) of the Copyright Act, plaintiff acquired only the right to "vend the copyrighted work". **An adaptation of such a work of art is regarded as a new work which must be copyrighted (Section 7, Copyright Act; Pl. Exs. 5, 6, 7).** This further emphasizes the necessity of plaintiff's producing and proving upon the trial the copyrighted work instead of diverse models described as "embodying" said copyrighted work. Under the Copyright Act, each of such variances must be regarded as a new work which would be required to be separately copyrighted.

POINT III

Respondent's brief, in part, consists of irrelevant and prejudicial matter.

Part of respondent's brief consists of a discussion of the factual issues of the alleged infringement, accompanied by the type of unfounded and prejudicial remarks which have characterized plaintiff's presentation herein throughout and which the Court of Appeals excused as being "prompted perhaps by an excess of zeal" (R. 279). Like some of the District Court's remarks on the trial they are, in the words of the Court of Appeals, both "unseemly and uncalled for" (R. 279).

Such discussion is not relevant to the important questions of federal law raised in the petition for review by this Court.

Sufficient here to say there was no proof that the Woolworth dog statuette was copied directly or indirectly from plaintiff's copyrighted work of art or from any one of plaintiff's diverse models. Infringement was rested and deduced solely on claimed similarities (disregarding the dissimilarities) between the Woolworth dog and some one or another of plaintiff's diverse models, each said to "embody" the unproved copyrighted dog. And it was only because of the erroneous and highly technical ruling of the antagonistic trial Court, without "giving any reasons" (R. 238-240, 231-3), that defendant was prevented from offering scientific evidence (which fully confirmed the verity of Moyer's testimony), that defendant's Exhibit F, of which the Woolworth statuette (Pl. Ex. 1, Def. Ex. A) was an *actual and direct copy, was authentic and produced in 1938* (the year date embedded on it)—which was *four*

years before plaintiff's assignor produced or obtained a copyright on the work of art alleged to have been infringed.*

The Court of Appeals glossed over this manifest inequity on the ground that defendant "gambled on a favorable discretionary ruling by the Court" and "lost" (R. 275), despite the fact that the trial Court theretofore had assured defendant of equal treatment with plaintiff in respect of rebuttal evidence (R. 181) thus, presumably, eliminating any element of chance inherent in discretion.

We had assumed the day was past when justice in an equity case could be thwarted by such an unfair judicial process. Petitioner might well have urged in its petition, that in this respect the District Court had departed from the accepted and usual course of judicial proceedings in this enlightened day of liberal practice and that the Court of Appeals had sanctioned such a departure, but it chose, rather, to confine its petition to the stated questions of copyright and federal law which are of such great importance and widespread interest and application.

* Petitioner did not include this 1938 grey plaster model (Def. Ex. F) among the physical exhibits requested to be sent to this Court because it is not relevant or material to any question raised in the petition (cf. Res. Br., p. 4 in.), but respondent, if so inclined, could request that this exhibit be transmitted to this Court, to which Petitioner has no objection.

CONCLUSION

We respectfully submit, for the reasons set forth herein and in petitioner's petition and brief in support thereof, that the petition should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 42

F. W. WOOLWORTH CO.,
Petitioner,
against
CONTEMPORARY ARTS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 42

F. W. WOOLWORTH Co.,

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against

CONTEMPORARY ARTS, INC.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit (R. 268-80) is officially reported in 193 F. (2d) 162. The memorandum of decision of the United States District Court for the District of Massachusetts (R. 15-25) is officially reported in 93 F. Supp. 739.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1) and Rule 38, Paragraph 5(b) of the Revised Rules of the Supreme Court of the United States.

On June 2, 1952, this Court made an order (R. 281) granting the petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit "limited to the question presented by the application of Section 101(b) of Title 17 of the United States Code to this case".

The Statute Involved

The statute involved herein is Section 101(b) of Title 17 of the United States Code (formerly Section 25(b)). It is printed herein at pages 11-12.

STATEMENT OF THE CASE

(a) Preliminary Statement

This action was commenced November 1, 1949, by plaintiff, Contemporary Arts, Inc., the respondent here, in the United States District Court for the District of Massachusetts, against F. W. Woolworth Co., the petitioner here, for alleged infringement of copyright (R. 5-7). The copyright allegedly infringed is for a "work of art", entitled "Cocker-spaniel in show position". The work was published March 26, 1942, two copies of it being deposited in the Copyright Office on March 28, 1942 (Pl. Ex. 3; R. 28, 252). Plaintiff sued as the copyright assignee (Pl. Ex. 4; R. 5-6, 28, 253).

The complaint alleged (R. 6) that defendant had infringed plaintiffs' copyright "in said sculpture and work of art" by reproducing and selling copies thereof. Plaintiff demanded, in its complaint, damages and profits or statutory damages of not less than \$250 (R. 6).

Plaintiff, on trial, produced and offered in evidence as the infringed articles and as "embodying the copyright", three dog statuette models, each of which differed from

the other and none of which was identified to be a duplicate of the deposited work upon which a copyright had been obtained (R. 31, 50).

As the Court of Appeals noted (R. 269), one was of buff colored plaster with a spot of black on the muzzle and on each eye, which retailed for \$4.00 (Pl. Ex. 5; R. 31); one, smaller, was of red porcelain, which retailed for \$9.00 (Pl. Ex. 6; R. 31); and one, also smaller, was of black and white porcelain, which retailed for \$15.00 (Pl. Ex. 7; R. 31). These "embodiments" were diverse as to color, size and materials and also, in certain ways, as to shape and aspect (R. 272-3).

The alleged infringing article was a light-brown ceramic statuette of a cocker-spaniel dog in show position (Pl. Ex. 1; Def. Ex. A; R. 28-9), which retailed for \$1.19. This article was purchased by Woolworth early in 1949 from Sabin Manufacturing Co. of McKeesport, Pennsylvania (R. 73-5, 123). Sabin, in turn, had obtained it from Lepere Pottery Company of Zanesville, Ohio (R. 124) which had acquired it (i.e., the dies, molds and a plaster reproduction of it) as part of the stock of Burley Pottery Company of Zanesville, Ohio, after Burley had made and sold the dog statuette in 1938, and had later, during that year, gone out of business (R. 135, 139, 141, 148-9, 154-5, 159; Def. Ex. F; R. 136).

Defendant's primary defense to the infringement claim was that the ceramic statuette of a dog which it had sold was not copied, directly or indirectly, from plaintiff's work copyrighted in 1942, but was, in fact, an exact copy and reproduction of a statuette designed and modeled independently, by a craftsman named Moyer, using his own pet cocker-spaniel English type as a model, in 1938, while he was in the employ of said Burley Pottery Company, which company, in that year, manufactured and sold such statuettes but later went out of business and disposed

of its stock. In support of this defense, Moyer testified to his making of said cocker-spaniel model, as aforesaid, and produced a grey plaster statuette (Def. Ex. F; R. 136), with the year date "1938" embedded in it, which he identified as an early replica of his work and which he said he found, together with the Burley set of dies and molds from which to make it, in the storeroom of the Lepere concern, for whom he had later gone to work.

As the Court of Appeals stated (R. 269), the issue of infringement was "hotly contested".

However, that Court upheld the District Court's finding of infringement, as being supported by ample evidence and as not being clearly erroneous (R. 272-3). It also upheld, as not erroneous (on the theory that defendant had "gambled on a favorable discretionary ruling" by the trial court and having lost, could hardly be heard to complain) the ruling by the trial judge in rejecting the evidence, offered on rebuttal by defendant, of a scientific expert from M.I.T. on materials and plasters to the effect that the plaster model (Def. Ex. F—from which the alleged infringing model was made) was authentic and as old as the 1938 year date imprinted on it which evidence would have shown that the original of defendant's article antedated by four years plaintiff's copyright (R. 273-5, 229-40). The Court of Appeals also overruled defendant's contention that it had not received from the trial judge a fair and impartial trial, though it recognized that the trial judge had made remarks which were "both unseemly and uncalled for" (R. 279-80).

The District Court adjudged plaintiff's copyright to be valid and infringed and awarded plaintiff statutory damages in the maximum amount of \$5,000, as well as \$2,000 as an attorney's fee (R. 14, 25).

The Court of Appeals affirmed that judgment, with an additional attorney's fee of \$500 (R. 280).

The order allowing certiorari (R. 281), limits the review by this Court "to the question presented by the application of Section 104(b) of Title 17 of the United States Code to this case." Accordingly, the factual statement which follows is restricted to the facts bearing on that question.

(b) The material facts bearing on the application of Section 101(b) of Title 17 U.S.C. to this case.

Defendant's profits from its sale of the alleged infringing article, a dog statuette, were proved with exactness. At the commencement of the trial, it was stipulated (R. 26-7) that Woolworth had purchased, as a trial order, from its supplier, Sabin Manufacturing Co. of McKeesport, Pa., 127 dozen (1524) of said dog statuettes which were distributed for sale in 34, only, of its more than 1,900 retail stores; that Woolworth had paid 60¢ for each statuette and had sold them at \$1.19 each, for a gross profit of 59¢ per statuette; and that its total gross profit was \$899.16.

During plaintiff's case, the Woolworth buyer, Lindquist, testified likewise (R. 72-4); and was cross-examined by plaintiff's counsel (R. 74). Later, Sabin testified to the same effect (R. 122-3). It was also proved, without contradiction, that Woolworth had placed with Sabin this single trial order of 127 dozen dog statuettes in January 1949, and that this merchandise had been delivered to Woolworth stores in March, April and May, 1949 (R. 73-4, 123, 132, 26, 255-6). Woolworth did not, after placing said trial order, order or purchase any more of said dog statuettes (R. 74, 123, 255-6). The order was placed and the merchandise was received (and presumably disposed of) by said stores before Woolworth had knowledge of

plaintiff's copyrighted work or of the claimed infringement (R. 74). Plaintiff's notice of infringement, dated May 23, 1949 and addressed to a store, was received by the Woolworth company about June 1, 1949, and Woolworth promptly notified Sabin of it (R. 123, 127-9, 257; Pl. Ex. E). Sabin thereupon automatically discontinued dealing in the article, which, incidentally, had proved a poor seller (R. 123-4).

Woolworth, through Lindquist, had placed said order from a finished sample of said dog statuette exhibited by Sabin (R. 74, 124). Sabin was not the manufacturer, but merely the factory distributor for the manufacturer, Lepere Pottery of Zanesville, Ohio, a small factory with whom he had dealt for some years (R. 123-7).

Plaintiff's counsel conceded that Woolworth had acted innocently in selling the article, stating (R. 76):

"The Woolworth Company is in the innocent position of a bystander. It appears, from what Mr. Lindquist says, he doesn't know there was a copyright on the dog."

There was no proof that Woolworth, Sabin, Lepere, Burley or Moyer ever had seen or had access to plaintiff's copyrighted dog statuette or any copy or reproduction thereof or any of the diverse "embodiments" thereof or that anyone of them had knowledge of plaintiff's copyright prior to said notice.

Not only were defendant's profits proved with mathematical certainty, but plaintiff did not prove any actual damages or make any real effort to do so. Neither did plaintiff make any showing that it was difficult or impossible to prove actual damages. Moreover, no such difficulty or impossibility existed in fact. The subject matter of the alleged infringement—one specific statuette—(unlike a story in a newspaper which is combined with other copyrighted features or a motion picture to which the

infringer contributed his own talents) presented no difficulty as to proof of damage.

Any so-called "difficulty" that plaintiff might have had in proving its alleged actual damages, if any, was of its own choosing (R. 114, 119, 120, 121), followed from unchallenged statements and rulings by the District Court (R. 77, 111, 113-115, 117-119, 120-1) and represented merely the assertions of its counsel (R. 114, 119-21, 183). *Plaintiff did not prove by any evidence* that any such difficulty or impossibility actually existed. It never produced any of its books or records of its business operations, though oral and speculative testimony on the subject was early objected to on that specific ground (R. 115, 182).

When given an opportunity by the District Court to put in evidentiary proofs of actual damages, plaintiff's counsel stated "Our reliance was on statutory damages, your Honor" (R. 182-3, 238); and at this time the District Court advised plaintiff's counsel of the difficulties "unless you show some actual damages" (R. 183). Later, however, during rebuttal, plaintiff's counsel merely made an *offer* of proof of some evidence of actual damages, again without any books or records to support it, which offer he did not follow up, after defendant's counsel indicated the necessity of plaintiff's producing sales records and his exercising the right of cross examination in respect thereof (R. 245-6). Moreover, plaintiff failed to avail itself of the further opportunity, suggested by the Court at the end of the trial, to have a special master appointed to "go into damages" (R. 247). Plaintiff's position throughout was that its reliance was on statutory damages and that it, *on its own election*, had a right to statutory damages in place of and irrespective of actual damages or profits (R. 34, 182-3, 248-9).

Plaintiff did not produce or identify upon the trial the dog statuette which was the basis of the copyright and actually deposited in the Copyright Office or a replica thereof, but only three variant models, each of which was said by its counsel to "embody" the copyright (R. 31, 50). Plaintiff did not prove that it was selling its copyrighted dog statuette at the time Woolworth placed its trial order with Sabin for the alleged infringing statuette. Plaintiff produced no books or records to show that it was dealing in said copyrighted dog statuette, let alone all of said three variant models, during the very brief period of several months in 1949 of the alleged infringement. The whole award for damages and counsel fee is in reality predicated upon a showing that was never made, to wit, that plaintiff had been damaged in its sale of said *copyrighted* work of art.

Also, there was no evidence that the alleged infringing statuette and plaintiff's statuettes were competitive articles or sold in the same market. According to plaintiff, its dog statuettes were distributed through dealers and sold to dog fanciers, kennel shops, dog clubs, dog breeders, trainers and judges and at dog shows and as trophies. They were also sold at high-priced gift shops (R. 111-12, 116, 221). The alleged infringing article was sold in only a few of defendant's low-priced stores, none of which were in New England where plaintiff had its place of business (R. 10). Nor was it shown that defendant's said sales occurred during the same time period as the sales of plaintiff's copyrighted article or of any one or all of the several "embodiments" thereof.

Hereinafter, under Point I (at pages 12-13), are set forth the basis of the District Court's award of maximum statutory damages and the basis of the Court of Appeals.

affirmance thereof, with references to the texts of their respective opinions.

Specification of Assigned Errors to be Urged

1. It was error for the Court of Appeals for the First Circuit, on an appeal in a copyright infringement suit, to uphold the District Court's award to plaintiff of maximum statutory damages in lieu of plaintiff's actual damages and defendant's profits, where plaintiff neither proved actual damages nor difficulty or impossibility of proving such actual damages and where defendant's profits were proved with mathematical certainty.

2. It was error for the Court of Appeals for the First Circuit, to allow, on appeal, by a unique method of computation of damages without statutory or judicial sanction in a copyright infringement suit, an award of statutory damages in an arbitrary amount, in addition to the precise amount of defendant's gross profits, in order to maintain the exact amount of the District Court's award of maximum statutory damages.

3. The award of statutory damages, under the circumstances of this case, was erroneous in that it amounted to the imposition of a penalty.

4. The decision of the Court of Appeals for the First Circuit, in its interpretation and application of Section 101(b) of the Copyright Act, particularly the "in lieu" clause thereof, is erroneous in that it is in conflict with the decisions of this Court and with the decisions of the Courts of Appeals of other Circuits.

Summary of Argument

The decisions below have construed and applied the "in lieu" clause of Section 101(b) of the Copyright Act in conflict with decisions of this Court and with decisions of Courts of Appeals of other Circuits. No basis for a discretionary award of statutory damages existed in this case because there was exact and undisputed proof of defendant's profits from the alleged infringing articles, no proof of actual damages to plaintiff, and no showing that it was difficult or impossible to prove such damages.

Under the circumstances of this case, the District Court's award of maximum statutory damages, instead of the ascertained amount of defendant's profits, amounted to the imposition of a penalty. The Court of Appeals' having held clearly erroneous the District Court's finding that profits could not be determined with legal certainty, it had no legal basis for affirming the District Court's gross award of \$5,000 statutory damages. The Court of Appeals should have modified the judgment below by limiting the award to the amount of defendant's profits, as proved.

Where either actual damages or profits are proved, there is no basis for an award of statutory damages under Section 101(b) of the Copyright Act. In no event, may a Court award, as did the Court of Appeals, both statutory damages and profits.

ARGUMENT

POINT I

The decisions below have construed and applied the "in lieu" clause of §101(b) of the Copyright Act in conflict with decisions of this Court and with decisions of Courts of Appeals of other Circuits.

Where, as here, there was mathematically certain and undisputed proof of defendant's profits from the alleged infringing articles and no proof of actual damages, no basis for a discretionary award of statutory damages existed.

The award by the District Court of \$5,000 damages was based on the Copyright Act, Title 17, U. S. Code, Sec. 101 (formerly Sec. 25(b)), which permits an award of statutory damages "in lieu of actual damages and profits". The statute, so far as applicable, provides:

“§101. Infringement

“If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * *

“(b) **Damages and profits; amount; other remedies.** To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the Court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, * * * and such damages shall in no other case exceed the sum of \$5,000

nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under the law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

"First. In the case of a painting, statue or sculpture, \$10 for every infringing copy made or sold or found in the possession of the infringer or his agents or employees; * * *"

In making its award, the District Court found:

"It is difficult, if not impossible, for the plaintiff to prove its actual damages and defendant's profits, with the certainty required by the law for the recovery of actual damages and profits. (R. 24)

* * * * *

"Pursuant to S 101 of the Copyright Act, and 'in lieu of actual damages and profits' the Court in its discretion awards the plaintiff statutory damages in the amount of \$5,000, at the rate of \$10 per infringing copy for the first 500 infringing copies." (R. 25)

Actually, there was precise, mathematical and undisputed evidence of defendant's profits from its sale of the alleged infringing article. Under the statute, in order to prove such profits, plaintiff was required only to prove sales and this was done. The facts as to such sales, which resulted in a total gross profit to defendant of \$899.16, are stated above and were found by both Courts below (R. 16, 24, 269, 279).

In view of such undisputed facts, the Court of Appeals found (R. 279):

"It is true that the defendant by showing its gross profits, (fol. 282) which the plaintiff does not

dispute and with which the defendant appears to be content, has made clearly erroneous the district court's finding that profits cannot be determined with legal certainty. Thus any assessment of profits under the 'in lieu' clause is precluded."

However, in deciding the remaining question—and the question now before this Court—as to whether when defendant's profits have been ascertained, a court may nevertheless make an award of statutory damages under the "in lieu" clause, the Court of Appeals, in a confusing statement made an unprecedented ruling permitting an award of defendant's actual profits (\$899.16) *plus* statutory damages in the purely arbitrary amount of "\$4,100 and odd cents," thus maintaining the gross statutory damage award of the District Court (R. 279).

The decision of the District Court, as well as the decision of the Court of Appeals affirming it, are in conflict with the decision of this Court in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 399 (1940), in which it was held that the "in lieu" clause was not applicable where profits have been proved, and with the rule stated by this Court in *Douglas v. Cunningham*, 294 U. S. 207, 209 (1935), that the statutory damage provision was adopted to afford a copyright owner relief "in a case where the rules of law render difficult or impossible proof of damages or discovery of profits".

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, *supra*, the infringement, which was deliberate, was of plaintiff's play by defendant's motion picture. Defendant's net profits from the motion picture, amounting to \$587,604.27, were proved. There was no proof of actual damages. This Court, in interpreting Section 25(b) of the Copyright Act, stated, at page 399:

"We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have

been proved and the only question is as to their apportionment."

In the earlier case of *Douglas v. Cunningham, supra*, the alleged infringement consisted of the unauthorized publication of plaintiff's copyrighted story in some 384,000 copies of a Sunday edition of a Boston newspaper. The infringement was found to be clear, but innocent. There was no proof of plaintiff's actual damages or of defendants' profits. The trial judge ruled that no actual damage had been shown and granted plaintiff \$5,000 statutory damages and a counsel fee, but the First Circuit Court of Appeals reassessed the statutory damages in the minimum amount of \$250. This Court reversed the Court of Appeals and stated, at pages 208-9:

"The sole question presented by the petition for certiorari is whether consistently with §25(b) of the Act of 1909, an appellate court may review the action of a trial judge in assessing an amount in lieu of actual damages, where the amount awarded is within the limits imposed by the section."

In answering that question in the negative and in construing the purpose of Section 25(b) of the Copyright Act, this Court stated, at page 209:

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory."

In two earlier cases this Court had occasion to consider Section 25(b).

In *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202 (1931), where the infringement consisted of an unauthor-

ized performance of a musical composition, there was no showing of actual damages and an award of \$250 minimum statutory damages was upheld. This Court pointed out, at page 206, that:

“* * * the primary purpose of §25 was to incorporate in one section all of the civil remedies theretofore given, including statutory damages *where actual proof was lacking.*” (Italics supplied.)

In *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100 (1919), the infringements consisted of publications in a newspaper of copyrighted illustrations of styles and this Court held that an award of \$250 minimum statutory damages in each case was proper. There was no proof of plaintiff's actual damages or of defendant's profits and both parties recognized that, under the proofs, the damages had to be assessed under the “in lieu” clause of the statute.

In none of these cases is there any suggestion that statutory damages may properly be awarded in the discretion of the court where there is proof either of plaintiff's actual damages or of defendant's profits.

The decisions below, also, are contrary to and in direct conflict with the decisions of other United States Courts of Appeals.

The leading case of *Davilla v. Brunswick-Balke Colender Co.*, 2 Cir., 94 Fed. (2d) 567 (1938); cert. den., 304 U. S. 572, is exactly in point on the question here involved; and there the rule is stated to be that proof of profits precludes the recovery of statutory damages and that it is not a matter of choice with the plaintiff whether profits or statutory damages are to be allowed.

In the *Davilla* case, the infringement consisted of unauthorized phonographic records of plaintiff's copyrighted song and there was proof of defendant's profits.

The District Court had confirmed the award by a master of \$5,000 statutory damages and an attorney's fee to plaintiff. The Court of Appeals for the Second Circuit unanimously modified that decision by eliminating the \$5,000 award of statutory damages and in place thereof, awarded profits in the sum of \$1,057.53, with a reduced attorney's fee.

Therein, defendant's profits were proved by a statement, filed by defendant, setting forth the number of records sold, the selling price and the cost of production.

The Second Circuit Court of Appeals stated, at page 568:

"Whether profits shall be awarded or statutory damages allowed is not a matter of choice with a plaintiff. In *Douglas v. Cunningham*, 294 U. S. 207, 209, 55 S. Ct. 365, 366, 79 L. Ed. 862, the court said: 'The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.' See *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 51 S. Ct. 407, 75 L. Ed. 978; *Hendricks Co. v. Thomas Pub. Co.*, 2 Cir., 245 F. 37."

The Court also stated, at pages 569-70 (italics ours):

"On the issues as framed, we think there was ample evidence to make *an award of damages on the basis of actual profits*, and therefore the master and the court below were in error in granting statutory damages. The master's report is based on the theory that there was an inadequate explanation of appellant's failure to produce certain books, that there was error in the first statement made to appellee as to the number of sales, and therefore appellant probably sold or disposed of more than 5,285 records. Be that as it may, *actual profits*

were sufficiently established before the master so as to preclude the recovery of statutory damages.

Since the amount of the sales was sufficiently proved, there was no basis for an award of statutory damages. Such an award should not be based upon the idea of punishment, but depends upon the absence of proof of actual profits and damages. *Turner & Dahnken v. Crowley*, 9 Cir. 252 F. 749, 754; *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499."

In *Sammons v. Colonial Press*, 1 Cir., 126 F. (2d) 341 (1942), the Court of Appeals for the First Circuit unanimously approved and followed the *Davilla* case. Therein, the District Court had awarded plaintiff, as to one defendant, statutory damages in the minimum amount of \$250. On plaintiff's appeal, the Court of Appeals reversed and remanded the case to the District Court for the purpose of ascertaining if that defendant had made any profits, with instructions that the amount of such profits, if any, would be the measure of recovery. The Court of Appeals stated, at page 350:

"No evidence of actual damages having been given, if Colonial Press made no profits for which it is accountable the assessment by the district court under §25(b) of statutory damages against Colonial in the minimum amount of \$250 cannot be reviewed upon appeal. *Douglas v. Cunningham*, 1935, 294 U. S. 207, 210, 55 S. Ct. 365, 79 L. Ed. 862; *Hartfield v. Peterson*, 2 Cir., 1937, 91 F. 2d 998, 1001. However, if the district court finds after further hearing upon remand that Colonial Press made profits for which it must account, the amount of such profits will be the measure of recovery, and it will no longer be permissible to decree statutory damages 'in lieu of actual damages and profits.' *Sheldon v. Metro-Goldwyn Pictures Corp.*, 1940, 309 U. S.

390, 399, 60 S. Ct. 681, 683, 84 L. Ed. 825; *Davilla v. Brunswick-Balke Collender Co. of New York*, 2 Cir., 1938, 94 F. 2d 567, 569. Cf. *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 8 Cir., 1939, 102 F. 2d 282."

However, in the instant case, that same Court has brushed aside the *Davilla* case simply with the comment that while the language therefrom relied upon by petitioner "seems to lend support to its argument that proof of actual profits precludes the assessment of statutory damages under the 'in lieu' clause," such language was "taken out of context" (R. 276-7). That comment is without basis since, obviously, the *Davilla* case is exactly in point here. Realizing that, respondent's attorney, much more forthrightly than said Court, sought to avoid the *Davilla* case, in his brief herein opposing certiorari, on the ground it was "wrongly decided" (with which we disagree).

In *Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. (2d) 354 (1947), the Court of Appeals for the Ninth Circuit has adopted the same rule. Therein on plaintiff's cross appeal, it stated at page 378:

"Award of statutory damages in the terms of the statute is proper only in the absence of proof of actual damages and profits. The court having found the extent of both, the point fails. The court awarded actual damages, holding the award on that basis as adequate without resorting to the use of statutory damages. We find no error in this course."

The rule of the *Sheldon* and *Davilla* cases, cited above, has also been followed in the Court of Appeals for the District of Columbia. In *Washingtonian Pub. Co., Inc. v. Pearson*, D. C. Cir., 140 F. (2d) 465 (1944), that Court stated:

“Since the ‘in lieu’ clause is not intended as a penalty, the court was right in awarding no damages. That clause ‘was adopted * * * to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits’ (Douglas, et al. *v.* Cunningham, et al., 294 U. S. 207, 209, 55 S. Ct. 365, 366, 79 L. Ed. 862). It is not applicable here, first because there was no ‘injury done’ to appellant (Woodman *v.* Lydiard-Peterson Co., C. C. D. Minn., 193 F. 67; cf. L. A. Westermann Co. *v.* Dispatch Printing Co., 294 U. S. 100, 108, 39 S. Ct. 194, 63 L. Ed. 499) and second because ‘the profits have been proved * * *’ (Sheldon *v.* Metro-Goldwyn Pictures Corp., 309 U. S. 390, 399, 60 S. Ct. 681, 684, 84 L. Ed. 825; Davilla *v.* Brunswick-Balke Collender Co. of New York, 2 Cir., 94 F. (2d) 567).”

A very recent case directly in point arose in a District Court in the Ninth Circuit. In *Malsed v. Marshall Field Co.*, 96 F. Supp. 372 (U.S.D.C., W. D. Wash. N. D., 1951), action was brought for infringement of copyright on a label and plaintiff sought an injunction, damages and profits. In making an award of \$100 profits, the Court said at pages 376-7 (Italics in original):

“The ‘in lieu’ provision is, as the language of the section states specifically, ‘in lieu of actual damages and profits.’

“It does not apply where *either* actual damages or profits are ascertainable. This has been the ruling of the courts ever since the section was amended to its present form. The following quotations are typical:

“The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, *in a case where the rules of law render dif-*

difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory.' *Douglas v. Cunningham*, 1935, 294 U. S. 207, 209, 55 S. Ct. 365, 366, 79 L. Ed. 862. (Emphasis added.)

"The plaintiff seems to suppose that, regardless of any loss, it may satisfy its spleen by treating the allowances as penalties; but the section expressly declares that they are not to be regarded as such. They are "in lieu of actual damages and profits," and are limited to "such damages as to the court shall appear to be just," though it is true that the court may use them without proof of the quantum of the loss. The minimum was all that was proper, when we can see, as we can, that the plaintiff has not been damaged." (*Russell & Stoll Co. v. Oceanic Electrical Supply Co.*, 2 Cir., 1936, 80 F. 2d 864, 865.)"

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"The 'In Lieu' Provision Does Not Apply.

"The plaintiff takes the view that, because the recovery of both profits and damages are allowable, the 'in lieu' provision is effective in case one or the other element of recovery is difficult of ascertainment. The weakness of this argument is that it overlooks the very wording of the section which is to the effect that in order that the 'in lieu' provision be resorted to, there must be difficulty or impossibility of computing *both* damages and profits. Or, differently put, if profits ~~are~~ ascertainable, the minimum provided in the 'in lieu' provision *need not* be resorted to. The Supreme Court in *Sheldon v. Metro-Goldwyn Corp.*, 1940, 309 U. S. 390, 399, 60 S. Ct. 681, 684, 84 L. Ed. 825, has said so specifically: *'We agree with petitioners that the "in lieu" clause is not applicable here, as the profits have been proved and the only question is as to their apportionment.'* (Emphasis added.)

"But when the plaintiff has suffered no damages, and the profits are ascertainable, to resort to the

'in lieu' clause and award to the plaintiff a minimum based upon her theory of three publications,—*the printing of the five hundred labels and the two advertisements*—would amount to the imposition of a penalty. And the 'in lieu' provision has been declared by the cases *not to be such*, but rather, the equitable substitute for cases which present difficulty or impossibility of proof as to damages and profits. *Douglas v. Cunningham*, *supra*, 294 U. S. at pages 209-210, 55 S. Ct. 365, 79 L. Ed. 862. Where no such difficulty exists, where, on the contrary, exact proof of profits has been made, and no other damage is shown to have flown from the violation, there is no need for resorting to the 'in lieu' provision."

As shown in the statement of facts, not only were defendant's profits proved with certainty, but plaintiff failed to prove any actual damages or that it was difficult or impossible to prove such damages. No such difficulty or impossibility existed in fact because plaintiff's damages, if any, were readily susceptible of proof. Plaintiff, however, relied solely on statutory damages and took the position throughout that it, on its own election, had the right to statutory damages in place of and irrespective of actual damages or profits.

The District Judge, moreover, was under a misapprehension as to the appropriate rule of damage to be applied in such a case as this. It was his erroneous position that once infringement of copyright was proved, all he had to do was to apply the statutory measure or yardstick of statutory damages which he regarded as "fixed" (R. 77, 111, 113-4, 119-21, 248); and plaintiff's counsel acquiesced in that position (R. 111, 114, 121, 248). It is also apparent from said cited references to the Record that the District Judge was under a further erroneous impression that he was *required* to assess statutory dam-

ages for infringement of copyright at \$10 for each copy up to \$5,000. Actually, under the statute, the \$10 figure is purely discretionary. (See *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 105, *supra*; *Turner & Dahnken v. Crowley*, 9 Cir., 252 F. 749, 754 (1918); cf. *Douglas v. Cunningham*, 294 U. S. 207, 210, *supra*; *Amdur*, "Copyright Law and Practice," p. 1133 *et seq.*)

While plaintiff's counsel conceded and the District Court recognized that defendant was "in the innocent position of a bystander" (R. 76), nevertheless, that Court made an award of statutory damages and attorney's fee which amounted to the imposition of a penalty. Such awards could have been no more punitive if defendant had been a deliberate infringer, after notice (cf. R. 34).

Despite that state of the Record, the Court of Appeals stated that the District Court, on adequate evidence, categorically found that the plaintiff had suffered damage from the alleged infringement (R. 278). Actually, the District Court made no such finding. The District Court stated merely, that "the plaintiff *offered* testimony" that the sale of its dog statuette was harmed by the sale of the Woolworth dog (R. 24) and then restated, practically verbatim, the *offers* of evidence as made by plaintiff's counsel, which offers were rejected (R. 113-119, 244-6, 248), and the assertions in his opening statement (R. 32). *No such testimony was actually received.*

The Court of Appeals thus assumed that the plaintiff sustained actual damages and that while defendant's profits in the amount of \$899.16 were proved within the requirements of the statute, nevertheless, plaintiff in addition to these profits was entitled to statutory damages. The rationale for this novel method of calculation appears to have been the Court of Appeals' erroneous conclusion that in a copyright action, once infringement is established, a plaintiff is entitled to *both* his own actual dam-

ages and defendant's profits. It also placed a new and unwarranted interpretation on the case of *Douglas v. Cunningham, supra*, by citing that case as authority for the proposition that statutory damages are recoverable when "it is difficult or impossible for a plaintiff to prove the actual amount of *either* damages or profits with the certainty required by law" (R. 279) (*italics supplied*).

Actually, this Court has already stated that the proprietor of a copyright, like the holder of a patent, is entitled to actual damages *or* actual profits, whichever is greater. In *Sheldon v. Metro-Goldwyn Pictures Corp., supra*, this Court examined the intent of Congress in enacting in 1909 the section in the Copyright Act providing for damages, which section, for the first time, gave statutory sanction for the recovery of profits. In 309 U. S. at page 400, the Court said:

"In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the committee reports on the bill. As to §25(b) the House Committee said:

"Section 25 deals with the matter of civil remedies for infringement of a copyright * * *. The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater. As such a provision was found both in the trade-mark and patent laws the committee felt that it might be properly included in the copyright laws'."

The issue of whether a successful plaintiff in a copyright case was entitled to both profits and damages was squarely met in *Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F. (2d) 354, 375-6, *supra*. Therein an award of \$40,000 actual damages had been made and when defendant appealed and denied infringement, plaintiff cross-appealed on the question of damages and sought, in addition to plaintiff's damages, defendant's profits. The Court in refusing to grant profits, in addition to damages, relied on the *Sheldon* case, *supra*, referred to the intent of Congress as expressed in the Committee report quoted above and stated that the intention of Congress was to award a copyright proprietor *either* actual damages *or* defendant's actual profits, whichever was the larger.

When the Senate and House Bills revising the Copyright Act were before the Joint Committee, this section of the statute was criticized since it appeared to permit a double remedy in allowing the recovery of both profits and damages. As the Committee report (quoted in the *Sheldon* case above) points out, a similar statute in the Patent Act has been construed by the Courts not to allow such a double recovery. All of this was brought out in the Committee hearings and presumably was influential in the passage of the Act containing the present language as to profits and damages (see pp. 174-5, 408 of "Arguments before Committee on Patents of the Senate and House of Representatives, Conjointed, on the bills S. 6330 and H.R. 19853, Dec. 7, 8, 10, 11, 1906").

Since a copyright proprietor is not entitled to both profits and damages, but only one or the other, obviously the Court of Appeals was unjustified in awarding profits plus statutory damages. Even if the Court of Appeals had any evidential basis for assuming that plaintiff had suffered some damages, it certainly had no evidential basis for assuming that such damages exceeded the amount of defendant's profits.

There is no authority either in the statute or in any court decision for a court's exercising its discretion under the facts of this case. The statute precludes the exercise of discretion whenever actual damages or profits are proved. Discretion, which is not reviewable, comes into play only when neither profits nor damages have been proved, in which event, the court has discretion in making an award within the \$250-\$5,000 statutory limitations (*Westermann v. Dispatch Printing Co.*, *supra*; *Jewell-Lasalle Realty Co. v. Buck*, *supra*; *Douglas v. Cunningham*, *supra*).

The Court of Appeals attempted, in an effort to justify its decision (R. 276-7), to distinguish the cases cited by petitioner (the language from which that Court admits lends support to petitioner's argument that proof of actual profits precludes the assessment of statutory damages under the "in lieu" clause). The substance of that attempted distinction is that in the present case alone there is a "live" issue of plaintiff's damages (R. 277).

However, the only case that that Court specifically attempted to distinguish was its own earlier decision in *Sammons v. Colonial Press*, *supra*. As to that case, the Court said (R. 277-78):

"It is made clearly to appear that there was no issue of the plaintiff's damages, the only recovery sought or the only recovery available, on the evidence being the infringer's profits," but "the case at bar differs radically from those upon which the appellant relies in that here we have a live issue of damages."

Actually, in the *Sammons* case the Court (pp. 344-5) merely said that because of the difficulty of proof, the plaintiff did not attempt to prove damages which would have been measured by the "profits which the plaintiffs

would have made upon additional sales of its copyrighted book, had not the infringing book been competing in the market." The Court did not say that the plaintiff had not suffered actual damages; (and, in fact stated that normally a copyright proprietor is "presumed to have suffered from the infringement" (p. 345),) but only that therein there was no evidence of actual damages. Likewise, in the present case, there was no evidence of actual damages. Nor can the two cases be distinguished, as the Court suggests (R. 277-8), because the plaintiff herein "in its complaint specifically demanded, in addition to an injunction, attorney's fees and costs, both damages and profits in such amount 'as to the court shall appear proper * * *'". In the *Sammons* case, *supra*, plaintiff likewise in its complaint sought statutory damages in addition to an injunction.

What the Court of Appeals has really done herein is to depart from its decision in the *Sammons* case, wherein it followed the *Davilla* decision and has thus brought itself in conflict with that decision of the Second Circuit.

It is clear from the foregoing, we respectfully submit, that both Courts below have misconstrued and misapplied Section 101(b) of the Copyright Act and that their decisions are in conflict with the decisions of this Court and of Courts of Appeals in other Circuits.

POINT II

The "in lieu" clause of Section 101(b) of the Copyright Act is not intended as a penalty, but has been so applied herein.

The award of maximum statutory damages against defendant, under the circumstances of this case, clearly amounted to the imposition of a penalty.

Although it was conceded that defendant was in the "innocent position of a bystander" and was not a deliberate infringer, had no knowledge before notice of plaintiff's copyright and ceased dealing in the accused article promptly upon receiving such notice or even prior thereto; and although defendant's total gross profits from the sale of the alleged infringing article were only \$899.16; and although there was no proof of actual damages to the plaintiff, either in an amount exceeding the amount of such profits or in any amount whatever; nevertheless, the District Court "in its discretion" made an award of statutory damages against the defendant in the maximum amount of \$5,000 with an attorney's fee of \$2,000 and the Court of Appeals has, by a novel calculation and theory, upheld that award, with an additional attorney's fee of \$500.

There is, in the circumstances of this case, no rational basis for either the award or its affirmance, or for such allowances for counsel fees. Section 101(b) of the Copyright Act specifically provides, in respect of statutory damages, that such damages "shall not be regarded as a penalty". It has been stated repeatedly and in numerous cases that the "in lieu" clause is not intended as a penalty and that damages are not to be awarded as based upon the idea of punishment. (See, for instance, the following cases: *Sheldon v. Metro-Goldwyn Corp.*, *supra*, at page 399; *Douglas v. Cunningham*, *supra*, at page 209; *Westermann Co. v. Dispatch Printing Co.*, *supra*, at pages 107-9; *Davilla v. Brunswick-Balke Collender Co.*, *supra*, at page 570; *Turner & Dahnken v. Crowley*, 9 Cir., 252 F. 749, 754 (1918).)

The District Court Judge seems to have had the erroneous impression that the statutory damage provision was predicated upon the theory that such damages are punitive and plaintiff's counsel concurred in this erroneous view (R. 34).

The only plausible explanation of this award of statutory damages in the maximum amount against defendant appears to be found in the hostility manifested against defendant throughout the suit by the District Judge.¹ This may well have been caused or furthered by the wholly unwarranted invectives directed at defendant by plaintiff's counsel.

The Court of Appeals overlooked said remarks of plaintiff's counsel as being prompted by "excess of zeal in a hotly contested trial". It recognized that certain of the remarks of the trial judge in the course of the proceeding were "both unseemly and uncalled for" and "would better have been left unsaid, and are better not quoted" (R. 279-80). In these expressions, in and of themselves, the Court of Appeal found no reversible error (R. 280) and that point is not before this Court. But that is quite apart from the question of whether such expressions are indicative of the punitive nature of the award.

¹ For example, see Record, at p. 11 and also at pp. 125, 127, 130, 138-43, 148, 150-1, 155, 158, 160, 163-4, 175, 181, 189-202, 208-12, 232, 237-8; also, note how the trial judge opened the door wide for plaintiff for rebuttal with assurances to defendant's counsel that he would be given the "same latitude" and would "not be foreclosed if he had any other evidence" (R. 181-2) and how later, the trial judge excluded defendant's most important rebuttal evidence regarding the authenticity and date of its grey plaster model (R. 229, *et seq.*).

² For example, see Record, pp. 33-5 and 75.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be reversed, with costs and disbursements to defendant, and the judgment of the District Court for the District of Massachusetts should be modified, with costs and disbursements to defendant, so as to limit plaintiff's recovery to the amount of defendant's profits, without counsel fee.

Respectfully submitted,

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JOHN H. BARBER,
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Dated: October, 1952.

NOV 17 1952

HAROLD D. WILCOX, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 42

F. W. WOOLWORTH CO.,

Petitioner,

against

CONTEMPORARY ARTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONER

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Statute Cited

Title 17, U. S. Code:

Section 101(b) 4, 5, 6, 10, 13

Supreme Court of the United States

OCTOBER TERM, 1952

No. 42

F. W. WOOLWORTH Co.,

Petitioner,

against

CONTEMPORARY ARTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

POINT I

Respondent's statement of the facts relating to damages and profits is inaccurate and incomplete.

The only factual matter in Respondent's "Statement of the Case" bearing on the application of the damage section of the Copyright Act, which appears on pages 6 and 7 of its brief, does not fairly reflect the proofs in the Record.

Respondent asks this Court (Br. p. 6) "to note that respondent actually suffered *actual* damages . . . far in excess of \$5,000 . . .". There was no *proof* that respond-

ent suffered actual damages in that amount or any amount, or that it suffered actual damages at all (see Pet. Br. pp. 6-8).

On the same page, respondent states that the sales of its Cocker Spaniel were "killed by the Woolworth piracy". There was no such *evidence*. The only statements in the Record to this effect were non-probative assertions made by its counsel in colloquy (R. 32, 114, 244).

Respondent also states (Br. p. 6) that "dealers cancelled their orders for Respondent's dog line", and in support of this statement quotes Mr. Fox as "testifying" in the Record at page 118, as follows:

"We lost two of our big shops out there (Chicago) with the general complaint of copying."

The Record plainly shows at page 118 that this "testimony" was *stricken* by the Court.⁽¹⁾ There was no *evidence* to support said statement.

Respondent further states (Br. p. 6): "Respondent was then compelled to design a new Cocker (Plf's. Exh. 12) to replace the pirated dog". Respondent does not and cannot cite any *evidence* to that effect. Here, again, respondent is representing as evidence what was a mere assertion of its trial counsel (R. 244, 246). In fact, Plaintiff's Exhibit 12 was not even offered by plaintiff for that purpose, but solely to show "that it is still possible to make a cocker spaniel dog which is anatomically correct and authentic and realistic, without copying plaintiff's previous Jan Allen model" (R. 70-2, 90); and said exhibit was received for that limited purpose (R. 90).

(1) It should be noted that the trial court's references, at pp. 244 and 247 of the Record, to Fox's prior "testimony" as to damages were, in reality, merely to testimony that had been stricken or which had been offered and excluded.

Furthermore, respondent's own witness, the sculptress, Elizabeth Philbrick Hall, testified that any line "needs changing to keep abreast, as far as sale goes" (R. 103); and that need, so far as appears from the Record, was the reason plaintiff's designer, Press, worked up the new design of a cocker-spaniel statuette represented by Plaintiff's Exhibit 12 (R. 40, 70-71).

While the trial court did exclude testimony offered by respondent's counsel, purporting to show damages (the purpose of which, according to him was "to lay the foundation for an award of statutory damages" (R. 114)), respondent did not pursue its offer or appeal from the rulings of exclusion.

When, on rebuttal, the trial court advised respondent's counsel that it was not "going to preclude your showing any evidence of actual damage" (R. 182), respondent's counsel replied "Our reliance was on statutory damages" (R. 183). Toward the end of the trial, respondent's counsel again made a similar offer of proof, but did not follow through with admissible evidence, and the case ended, as it had begun, with the statement that respondent was relying on statutory damages (244-9).

It was *not* "admitted" that respondent was unable to prove its actual damages, from lost sales and the like, with the certainty required by law (Res. Br. p. 7). Respondent's counsel so admitted (R. 120), but offered no proof to show that it was difficult or impossible to prove its actual damages. Here, the subject matter presented no difficulties in respect of proof of damages, if any; and respondent was not "forced" to invoke the statutory damage clause (Res. Br. p. 7).

Respondent herein has sued Woolworth. It has not sued Sabin or Lepere, as it might. Any agreement between

Sabin and Woolworth (cf. Res. Br. p. 6), even if performed, would be irrelevant to the tendered issues between respondent and petitioner and cannot affect Woolworth's position as an innocent party.

Petitioner certainly is not bound by erroneous statements as to the law made by the trial court or either counsel during a colloquy on the trial (cf. Res. Br. p. 6).

Respondent, at page 7 of its brief, states that "Petitioner did not prove its profits", and at page 43 asserts:

"Presumably, for instance, the Petitioner here is willing to pay some 2% of its gross profits of \$889.16, or \$17.98."

Respondent then argues that petitioner did not prove its selling cost but that if it had, or if it had admitted "a small amount of actual net profits", those would have been "inadequate" for respondent and the case therefore falls within the rule propounded by respondent that Congress gave the District Court complete discretion to award statutory damages where damages or profits are small or so inadequate that they do not provide an effective remedy to prevent wilful and deliberate infringement (Res. Br. pp. 14-15, 41, 43-4, 49, 51). The statute, however (Section 101(b)) provides that:

"* * * in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims. * * *

The amount of the sales are without contradiction in the record. And the defendant, under the burden which the statute placed upon it, proved as the only cost to be deducted therefrom the wholesale cost of the dogs. The gross, actual and recoverable profits were, therefore, not

only the subject of precise testimony, but the subject of stipulation (R. 26-27, 73-74). The holding of the trial court that it was difficult, if not impossible, for the plaintiff to prove defendant's profits (which was the trial court's basis for allowing statutory damages; R. 24), was held by the Court of Appeals to be "clearly erroneous" (R. 279); and, under its recalculation the respondent has been allowed a recovery of this actual gross profit, and, *in addition*, statutory damages (R. 279).

While respondent now claims that defendant's profits were not proved, it ignores the decision of the Court of Appeals that profits had been determined with legal certainty (R. 279).

POINT II

¶ Respondent has failed to justify the District Court's award of statutory damages and the Court of Appeals' award of statutory damages plus profits. The cases cited by respondent do not support its contention that the District Court has complete discretion under §101(b) of the Copyright Act to award either actual damages and profits or statutory damages.

Respondent's basic argument in this Court, urged throughout its brief, is that in any case involving copyright infringement a district court has "complete" or "full" discretion to award *either* actual damages and profits *or* statutory damages under the "in lieu" clause of Section 101(b) of the Copyright Act (Res. Br. pp. 15, 41, 44, 49, 51). At page 41 it claims:

"The right to award statutory damages is in no way dependent upon the fact that there might have been some actual damages or actual profits which the plaintiff might have recovered."

None of the cases cited by respondent support this novel construction of Section 101(b). Actually, as this Court held in *Douglas v. Cunningham*, 294 U. S. 207 (1935), the "in lieu" clause, permitting statutory damages, comes into play only when under the rules of law it is difficult, if not impossible, for a copyright owner to prove damages or discover profits.

When that has been shown, a Court may *then* exercise its discretion in assessing the amount between the fixed limits of \$250 and \$5,000 and, also, in applying the schedule of damages suggested by Congress in the statute (*Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 400 (1919); *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202 (1931)).

Moreover, this Court has held that where profits alone have been proved, the "in lieu" clause is *inapplicable* (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 399 (1940)).

The cases cited by respondent (Br. pp. 15-18, 42-4) have no application here. With the exception of *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 8 Cir., 102 F. (2d) 282 (1939) and *Toksvig v. Bruce Publishing Co.*, 7 Cir., 181 F. (2d) 664 (1950), none of these cases made any finding as to defendant's profits.

In the *Johns* case, the Court found that defendant had caused damage to the plaintiff, the amount of which was unascertainable. Defendant attempted, on appeal, to limit plaintiff's recovery to \$5.10 because of its statement in answer to an interrogatory that its *net* profits were \$5.10. There was no finding as to defendant's sales or elements of cost. The Court of Appeals said (pp. 283-4):

"And in the absence of proof of both actual damages and profits, the trial court is required to award the minimum statutory sum of \$250."

The self-serving admission of net profits, which the Court did not accept in that case as proof of profits, is not comparable to the proof of profits in this case which profits the Court of Appeals for the First Circuit held had been ascertained with legal certainty. Moreover, it is implicit in the above statement of the Court, that it awarded statutory damages only because *both* actual damages and profits had not been proved.

In the *Toksvig* case, the Court stated that it was unable to determine defendant's profits, but estimated them at between 5¢ and 10¢ per infringing copy. In finding defendant had sold 14,262 copies, the Court awarded statutory damages of \$1,000, which comes to approximately 7¢ per copy, and in all probability, at least approximates defendant's profits.

In *Widenski v. Shapiro, Bernstein & Co., Inc.*, 1 Cir., 147 F. (2d) 909 (1945), the Court refused to hold that plaintiff's damages are measured by a price (as a license fee) at which a copyright proprietor indicated his willingness to sell an infringer, and awarded statutory damages of \$250, since the plaintiff was harmed but could not prove either his actual damages or defendant's actual profits.

As for the other cases cited by respondent the facts thereof indicate that defendant's profits were not ascertainable, especially in those cases involving infringement by a performance as distinguished from copying (*Jewell-LaSalle Realty Co. v. Buck*, *supra*), or where the infringing work is simply a portion of a larger work (*Douglas v. Cunningham*, *supra*). In *Westermann v. Dispatch Printing Co.*, *supra*, the Court at page 104 expressly stated that defendant's profits had not been shown. Respondent's quotation (Res. Br. p. 44) from this case is taken out of context. Actually it follows the Court's statement that both parties agreed that statutory damages

were applicable and that only then may a Court consider what is a "just" assessment.

Respondent, in support of its theory of damages, charges petitioner with "flagrant piracy" and repeatedly suggests that the infringement has been willful and deliberate apparently to justify the penalty which the District Court imposed. As pointed out before, this is contrary to the statute forbidding penalties and also contradicts respondent's own concession on the trial that petitioner was an "innocent bystander" (R. 76).

Respondent's attempt (Res. Br. pp. 45-9) to distinguish the cases cited in Petitioner's Brief is also futile because those cases manifestly negative respondent's theory that a Court has absolute discretion in awarding damages for copyright infringement. In every one of those cases the Court made it very clear that when it awarded profits rather than statutory damages, it did not do so in the exercise of discretion, but that it had no alternative as the "in lieu" clause simply was not applicable.

Respondent's explanation of *Washingtonian Pub. Co., Inc. v. Pearson*, D. C. Cir., 140 F. (2d) 465 (1944)—i.e., that the Court properly awarded profits in its discretion contradicts the express language of the decision wherein the Court said (at p. 466) the "in lieu" clause was "not applicable" because profits had been proved. It is to be noted, also, that as to defendants, Pearson and Allen, the award of profits amounted to \$15.46, considerably less than the minimum of \$250 which respondent claims a Court is required to award whenever infringement is found (Res. Br. p. 41).

Moreover, in that case, plaintiff sought both damages and profits and the Court, in awarding profits, refused to award damages on the ground that the "in lieu" clause is not intended as a penalty. Contrast this with the award

of both profits and statutory damages by the Court of Appeals in the instant case.

Respondent's statement on *Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. (2d) 354 (1947) is not correct. Therein the plaintiff sought to recover both actual damages and actual profits, but, in the alternative, asked for an award of statutory damages, the maximum amount of which was not limited under the statute to \$5,000 since the infringement had occurred after actual notice to defendant (cf. respondent's statement at pp. 47-8 of its brief). In refusing to award statutory damages, the Court also held that a plaintiff in a copyright case is not entitled to both damages and profits (contrary to the holding of the Court of Appeals in this case), but to one or the other, whichever is greater.

The award of actual profits of \$100 in *Malsed v. Marshall Field Co.*, 96 F. Supp. 372 (U.S. D.C., W.D. Wash. N.D., 1951) was not made in the discretion of the District Court Judge (cf. Res. Br. p. 49). In that case, the Court clearly stated that the "in lieu" clause "does not apply where either actual damages or profits are ascertainable". The *Malsed* case was recently approved in *Advertisers Exchange, Inc. v. Hinkley*, 8 Cir., 95 U.S. P.Q. 124 (Oct. 21, 1952, not officially reported). In the latter case statutory damages of \$312 were awarded since the copyright proprietor made no proof of actual damages or profits on account of the infringement. At page 126, the Court of Appeals for the Eighth Circuit said:

"The 'in lieu' provision of the statute is not to accomplish the imposition of a penalty as has been assayed here, but is an equitable substitute for cases which present difficulty or impossibility of proof as to damages and profits." [citing *Malsed v. Marshall Field Co.*, *supra*.]

Respondent makes no effort to distinguish *Davilla v. Brunswick-Balke Collender Co.*, 2 Cir., 94 F. (2d) 567 (1938), cert. den. 304 U. S. 572, but urges that it is "clearly wrong" and contrary to the decision in the *Douglas v. Cunningham* case, *supra*, on the theory that a Court awarding statutory damages according to the statutory schedule and within the fixed limitations of the statute, cannot be reversed on appeal. This theory requires the assumption that a Court may award statutory damages even when actual profits or damages are proved.

The *Davilla* case squarely holds that where profits are proved—in that case, as in this, by sales—the Court is precluded from awarding statutory damages and to do so is to use the statute as a punishment. Furthermore, the statute itself states that in proving profits, the plaintiff shall be required to prove sales only; and there is no requirement, as respondent insists (Res. Br. p. 49) that the amount of sales must always be proved "to serve as the basis for awarding statutory damages at the rate of \$1 per infringing copy". As has been pointed out previously, the Court has absolute discretion in employing the statutory schedule.

POINT III

Much of the respondent's brief consists of irrelevant and prejudicial matter.

A substantial part of respondent's brief consists of matter not relevant "to the question presented by the application of Section 101(b) of Title 17 of the U. S. Code to this case". Also, it is replete with the type of prejudicial and unjustifiable remarks which have character-

ized respondent's presentation herein throughout and which the Court of Appeals characterized as being "prompted perhaps by excess of zeal" (R. 279).

The issue of infringement is not before this Court under the order allowing certiorari (R. 281) — to petitioner's regret.

Nor are we concerned here with such matters as (a) the validity of a copyright registered by Moyer, not in litigation (Res. Br. pp. 5-6); (b) the Copyright Act of England and all of its historical antecedents or decisions thereunder (Res. Br. pp. 18-24); or (c) the Copyright Acts of the original states of this country (Res. Br. p. 25); or (d) the Federal Copyright Acts of 1790, 1802, 1819, 1831, 1856 and 1870 or decisions thereunder (Res. Br. pp. 26-35).

Under Rule 27(d) of this Court the "statement of the case" should contain only that "which is material to the consideration of the questions presented". Respondent's statement (Br. pp. 1-7) is largely devoted to a discussion of the factual issues relating to the alleged infringement, which petitioner did not brief (Pet. Br. p. 5). There certainly is no excuse or evidentiary basis for statements in respondent's brief that petitioner's alleged infringement was deliberate, willful, tainted with perjury and fraud (Res. Br. pp. 9, 10, 44, 51)—particularly in light of its admission on the trial that petitioner was an "innocent bystander".

Sufficient here to say, in brief reply to such discussion and attacks, there was no proof that Woolworth (or Sabin) committed any deliberate or willful infringement; and neither dealt in the accused article after notice and the original transaction (R. 74, 123, 255-6). Also, there was no *actual* proof that the Woolworth dog statuette was copied, directly or indirectly, from respondent's copy-

righted work of art or any one of respondent's several diverse models. Infringement was deduced and rested by the District Court solely on claimed similarities (disregarding dissimilarities) between the Woolworth statuette and some one or another of respondent's diverse models, each said to "embody" the unproved copyrighted work of art. And it was only because of the erroneous, highly technical and extremely inequitable ruling of the hostile trial court, made without "giving any reasons" (R. 238-40, 231-3), that petitioner was prevented from presenting, through a highly qualified expert on materials, very definite and scientific evidence (fully confirming and corroborating the verity of Moyer's testimony) that Defendant's Exhibit F, of which the Woolworth statuette was an actual and direct copy (as the Court of Appeals recognized—R. 274), was *authentic* and *produced in 1938*, the year date imprinted in it. This was *four years before* plaintiff's assignor produced or obtained the copyright on the work of art alleged to have been infringed. Furthermore, the trial court, in making this ruling, recognized that the excluded evidence would prove that the cast from which defendant's statuette was made "was manufactured back in 1938" (R. 235). Thus, was the search for the truth frustrated. It is regrettable too, we believe, that the Court of Appeals approved this ruling on the narrow and extremely technical ground that defendant "gambled on a favorable discretionary ruling by the court" and "lost" (R. 275), despite the fact that the trial court theretofore had left the case open for rebuttal by both parties, had assured defendant of equal treatment with plaintiff in respect of such rebuttal evidence (R. 181) and thus, presumably, had eliminated any element of chance inherent in the exercise of discretion.

We cannot and do not argue those points here, but merely mention them to indicate the lack of fairness in respondent's characterization of petitioner's acts.

CONCLUSION

✓ We respectfully submit that under the correct application of Section 101(b) of the Copyright Act to the facts of this case, there was no legal justification for the award by the District Court of statutory damages or for the award by the Court of Appeals of statutory damages plus profits, and that respondent's recovery should have been limited, in any event, to the amount of petitioner's profits.

For the reasons stated herein and in petitioner's main brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In the
Supreme Court of the United States.

OCTOBER TERM, 1952

No. 734 1/1

F. W. WOOLWORTH CO.,
Petitioner,

v.

CONTEMPORARY ARTS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 734

F. W. WOOLWORTH CO.,

PETITIONER,

v.

CONTEMPORARY ARTS, INC.,

RESPONDENT.

**BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.**

I. STATEMENT OF THE CASE.

Petitioner's Summary Statement of the Matter Involved does not adequately state the facts required for consideration of the questions presented. A fuller statement follows:

The copyright involved in this case is an original sculpture and work of art entitled "Cocker Spaniel in Show Position", designed in 1942 by Elizabeth Philbrick, who uses the professional name of "Jan Allan". The copyright was duly registered with the Register of Copyrights with deposit of copies, and Certificate No. 39960, Class G Pub. issued with a publication date of March 26, 1942 (Plf's. Exh. 3, Rp. 252), and was duly assigned to Respondent (Rp. 253). Respondent is a Massachusetts corporation with a place of business in Boston, and is engaged in the business of designing, manufacturing and selling small sculptured figurines and statuettes. It is a small business, doing \$35,000. gross annually with eight employees (Rp.

110). Their sculptures include dancing and national figures and objects, and authentic dog models, which are sold in art and gift shops and to dog fanciers. Respondent's sculptures are all original designs and great care is taken to make their dog models authentic, realistic and true to type (Rp. 49). Prize winning dogs are studied and dog experts are consulted in creating every dog model. Respondent makes its Cocker Spaniel in Show Position in a red plaster model selling at retail for \$4.00 (Plf's. Exh. 5), in red porcelain selling for \$9.00 (Plf's. Exh. 6) and in a fine black and white porcelain selling for \$15.00 (Plf's. Exh. 7). *These three models are one identical sculpture, merely reproduced in different media.* The same sculpture could be cast in metal, if desired. *All models are made from an identical master model.* But different media require different treatments—the porcelain requires glazing for instance—and porcelain shrinks in baking. Porcelain further requires a hard mold, instead of the flexible rubber mold used in making plaster models; and undercuts therefore have to be eliminated to permit removal of the model from its hard mold (Rp. 51-61). Thus the differences between Respondent's plaster and porcelain models (except for color which, of course, is optional) are due solely to the different techniques and requirements of reproducing in porcelain instead of plaster.

These facts alone dispose of Petitioner's Point II.

The infringement proved was the sale of ceramic models of Respondent's copyrighted Cocker Spaniel by the Woolworth Company—Plf's. Exh. 1 and Def't's. Exh. A. Respondent's proofs established beyond question that the Woolworth dog was copied directly from one of Respondent's copyrighted dogs by using it as a physical model (Rp. 61-63; 99; 104-5). The Lepere Pottery Company of Zanesville, Ohio was the manufacturer of the infringing dogs, and had scratched hairlines on the dog's coat in an

effort to change its appearance. In casting in ceramic from a hard mold, undercutting around the feet had to be removed, and the ceramic model necessarily shrank in baking (Rp. 100-101; 184-191). But otherwise the Petitioner's dogs were identical with Respondent's red plaster model (Plf's. Exh. 5). The Woolworth Company bought 127 dozen of the infringing dogs from the Sabin Mfg. Co. of McKeesport, Pennsylvania which in turn bought them from Lepere Pottery. The Woolworth Company sold the infringing models at \$1.19 retail.

The creation of the original sculpture by Miss Philbrick and its physical copying by the Lepere Pottery Co. was clearly proved, and the validity of the plaintiff's copyright and its infringement could not be disputed.

The only defense was an utterly preposterous story by one Harry Moyer, an employee of the Lepere Pottery Company, that by a remarkable coincidence he himself had created *the identical design* of the Respondent's Cocker Spaniel in Show Position, in 1938, four years earlier than Miss Philbrick. He produced a gray plaster model (Def't's. Exh. F) marked on the bottom "A.M.Co. 1938" and said it was "an exact dog of the one which I made for Burley Pottery in 1938" from an English Cocker Spaniel which had been given to him (Rp. 134). He said he had found the gray plaster model in a cabinet at the Lepere Pottery Co. in the early part of 1950, and that it was there when he became employed by Lepere in 1945. Moyer admitted that he had no sculpturing experience (Rp. 142-152), was not a dog expert, knew nothing about Cocker Spaniels, and that his own English Cocker Spaniel was "very heavy coated" (Rp. 146) and had never been shown or trimmed for showing purposes. But Miss Philbrick had testified that her own Cocker Spaniel was her effort to create "an ideal *American Cocker Spaniel*", her dog was shown in show position and had been trimmed for showing. The

"A.M.Co. 1938" was never explained. Moyer's oral testimony was wholly uncorroborated by any documentary evidence. Petitioner's gray plaster model (Def't's. Exh. F) however, is *identical in measurement, in length, width and height of head, body, legs and tail and in conformation of hair with plaintiff's plaster model* (Plf's. Exh. 5) as Miss Philbrick showed *when she applied her calipers to the two models* (Rp. 188). Such identity in the minutest detail could not possibly be a coincidence. Petitioner's gray plaster model (Def't's. Exh. F) was obviously copied directly from one of plaintiff's plaster models, such as Plf's. Exh. 5, with hairlines added to avoid the appearance of infringement (Rp. 184-192).^{*} The District Court refused to give the Moyer testimony any credence whatever (Opinion Rp. 22-24). The testimony was of course an insult to the Court's intelligence and Moyer was exceedingly fortunate to avoid being held for perjury. The situation was exactly the same as if the copyrighted work had been a novel, and the defendant contended that by a coincidence he had written the same novel earlier than the plaintiff, and produced an earlier dated manuscript *identical to the last word* in support of his defense, the defense otherwise being wholly uncorroborated.

Moyer's testimony further conflicted with previous statements as to the origin of the infringing Woolworth model (Plf's. Exh. 1) appearing in the letter of the Sabin Company to the Woolworth Company dated October 31, 1949 (Plf's. Exh. 15; Rp. 255) which stated:

"In regard to your recent letter, I am sorry this was not answered sooner, but I have checked quite thoroughly into the matter. We have purchased these

^{*}Very significantly Petitioner has not included its gray plaster model (Def't's Exh. F) among the physical exhibits requested to be sent to this Court.

molds from a pottery who has been making this dog since 1936.

"Please be advised that he states this was copied from a glass dog made in England. However, he is trying to find the original of this dog and up to the present writing, we have been unable to secure this sample. However, we would like to know when this copyright was put into effect."

No evidence was produced supporting these conflicting statements. But the letter shows that Lepere and Sabin had entirely changed their story in the meantime.

Moyer further testified that he had registered his own copyright on the infringing dog on February 11, 1950 (Rp. 38-39; 155-157). Yet it was asserted that the Lepere Pottery had been selling the infringing models since January 1948 and Sabin Mfg. Co. had sold them to Woolworth in March, April and May 1949, *all without notice of copyright*. (Rp. 134-135, 139; 152-3). It is elementary law of course that any copyrightable work publicly sold without notice of copyright is abandoned to the public and copyright protection cannot thereafter be secured.* Moyer thus in addition defrauded the Copyright Office in registering his own copyright on February 11, 1950 and in concealing the fact of the previous sale of his models without notice of copyright from the Copyright Office.

We ask the Court to note that the Woolworth Company has an indemnity agreement with the Sabin Company. Sabin wrote Woolworth (Rp. 256):

* *Universal Film Mfg. Co. v. Copperman*, 212 F. 301 (D.C.S. D.N.Y. 1914); *aff.* 218 F. 577 (C.C.A. 2, 1914);

Fleischer Studios Inc. v. Ralph A. Freundlich, Inc., 73 F. (2d) 276, at 277 (C.C.A. 2, 1934);

Smith v. Bartlett, 18 F. Supp. 35 at 37 (D.C.D. Me. 1937);

Wildman v. New York Times Co., 42 F. Supp. 412 at 414-415 (D.C.S. D. N.Y. 1941).

"We will go along with you and assume all cost regarding any damage or expense connected therewith."

Respondent admittedly was unable to prove its damages, from lost sales and the like, with the certainty required by law and consequently was forced to invoke the Statutory Damage provision of the Copyright Act (Title 17, U.S.C. Sec. 101(b)—which allows the trial Court, *in lieu of actual damages and profits* and in its discretion, to award statutory damages from \$250. to \$5000. at the rate of \$10. per infringing copy (in the case of sculptures and works of art).

Petitioner did not prove its profits. It merely showed that it had bought 1524 of the infringing models, at a cost of 60 cents each and had sold them for \$1.19 each. Petitioner made no effort to prove its selling costs and hence its net profits, which at most would have been about 2% of gross sales. On the facts stated and in its discretion the District Court awarded the plaintiff \$5000. statutory damages (Opinion Rp. 24-25). The District Court also awarded Respondent an attorney's fee of \$2000. cutting Respondent's requested fee of \$3945 (263 hours spent at \$15.00 per hour) approximately in half.

On appeal the court of Appeals for the First Circuit affirmed the judgment of the District Court in awarding \$5000. statutory damages and granted Respondent an additional \$500. attorney's fee in the Court of Appeals.

II. REPLY TO PETITIONER'S POINT I.

Petitioner contends that the decision below construes the "in lieu" clause of Sec. 101(b) of the Copyright Act in conflict with a decision of the Court of Appeals for the Second Circuit and in probable conflict with decisions of this Court and other Federal Courts.

Petitioner's Point I is wholly without merit. The damages section of the Copyright Act (formerly Sec. 25(b),

and now Title 17, U.S.C. Sec. 101(b) so far as here immaterial reads:

“(b) Damages and profits; amount; other remedies.

“To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated. . . . and such damages shall in no other case exceed the sum of \$5,000. nor be less than the sum of \$250. and shall not be regarded as a penalty. . . .”

The language of the Statute is clear and express: The copyright proprietor may recover such actual damages as he “may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement” . . . “or *in lieu of actual damages and profits, such damages as to the Court shall appear to be just*, and in assessing such damages the Court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages . . . shall not be regarded as a penalty.”

Congress thus gave the District Court entire discretion in allowing the copyright proprietor *either actual provable damages and actual provable profits, or statutory damages within the amounts stated*—in an effort to provide an adequate and effective remedy against piracy and wilful infringement and to discourage the very contempt of the copyright laws and the courts which the Petitioner displays in the present case.

It was just for such a case as this that Congress in revising the Copyright Act in 1909 added the statutory damage provision. While the Copyright Act of 1909 was pending before Congress, the Print Publishers of America addressed a memorandum to the Joint Committee considering the proposed Act which stated in part:

"Under the present law it is notorious that there are no effective remedies for piracy in 90 per cent of the cases that arise. In our own domain recoveries are so rare that general contempt of the law exists. . . . The impunity with which the present law can be violated has encouraged infringements in this country to such an extent that many of the infringers have come to look upon their appropriations as vested rights. Naturally they are disturbed when effective remedies are proposed."

It had been found that *actual damages and profits* were exceedingly difficult to prove in copyright cases and were frequently grossly inadequate, and that the previous Copyright Act was ineffective in preventing piracy of copyrighted works. Here there has been a flagrant piracy of Respondent's copyrighted work, with no bona fide defense. But Petitioner has compelled Respondent to bring suit and has put up a preposterous defense based on perjured testimony. Petitioner's evident purpose is to cause Respondent so much expense that it will never again try to protect its copyrighted designs from Petitioner's piracy.

This Court has already construed Sec. 101(b) in *Douglas v. Cunningham*, 294 U.S. 207 (1935). In that case the plaintiff was unable to prove any actual damages or profits and the District Court awarded maximum damages of \$5000. at the rate of \$1.00 per infringing copy of the plaintiff's story up to 5000 copies. The Court of Appeals for the First Circuit reversed, holding that under the circumstances the

District Court could award only the minimum statutory damages of \$250. This Court reversed the Court of Appeals, restoring the award of \$5000, maximum damages. Mr. Justice Roberts said as to Sec. 25(b) (now Title 17, U.S.C. Sec. 101(b)) at page 209:

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render *difficult or impossible proof of damages or discovery of profits*. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. *The ineffectiveness of the remedy encouraged wilful and deliberate infringement.*"

This Court again construed Section 25(b) in *Jewell LaSalle Realty Co. v. Buck*, 283 U.S. 202 at 207-208 (1931), in a case where there was no proof of actual damages or profits.

This Court similarly construed Sec. 25(b) in *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 and particularly at pages 106-107 (1919).

In the meantime Sec. 101(b) has been liberally construed by the lower courts in the manner intended by Congress, to give the District Court complete discretion to award actual provable damages and actual provable profits, or where these are difficult to prove or are inadequate, and in lieu thereof, to award statutory damages.

See:

S. E. Hendricks Co. v. Thomas Publishing Co., 242 F. 37 (C.C.A. 2, 1917) where the Court of Appeals upheld the

award of \$2500. statutory damages for 2800 copies of an infringing book as within the discretion of the District Court. Judge Hough there said (p. 41):

“As is well known, the language of this section is a growth of years resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it *difficult, if not impossible (as it often is), to prove damages or discover profits.*

“That keeping plaintiff out of a possible market for 2,800 copies of its own publication, by the issuance of a book competitive in every sense of the word; works some considerable injury, is a matter too plain to require more than statement. *That assessment of damages or ascertainment of profits under the facts hereinabove recited would be not only difficult but expensive is similarly obvious.* We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and (2) to give the new right of application to the court for such damages as shall ‘appear to be just’, in lieu of actual damages. . . .

“... in the present cause experience informs the court that \$250 would not and could not compensate plaintiff for a damage obvious, but difficult of exact admeasurement. It covers the matter in hand to repeat what we held in the Mail & Express Case, supra, that, where obvious and substantial pecuniary injury has been wrought, \$250 is the minimum award, and to approve the above-quoted language of Hand, J. *that the intent of the statute (under circumstances such as*

the present) *was to authorize the court to estimate the damages within the statutory limits, without being bound to or by legal proof.*"

Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F. (2d) 282 at 283-4 (C.C.A. 8, 1939) where the Court of Appeals affirmed the award of \$250. statutory damages for printing the lyrics of plaintiff's copyrighted songs, *where defendant admitted actual net profit from the infringement of \$5.10.*

Toksvig v. Bruce Publishing Co., 181 F. (2d) 664 at 667-8 (C.A. 7, 1950), where the Court upheld an award of \$1000. statutory damages even though the evidence disclosed that the defendant Bruce had sold 14,262 copies of the infringing book *at a net profit of 5 to 10 cents per book.*

Adventures in Good Eating v. Best Places to Eat, Inc., 131 F. (2d) 809 (C.A. 7, 1942) where the Court upheld an award of \$3500. statutory damages for 3500 copies of the infringing book, which defendant had sold at 50 cents per copy, and obviously at a profit.

General Drafting Co. v. Andrews, 37 F. (2d) 54 (C.C.A. 2, 1930), a map case, where the Court upheld an award of \$2000. statutory damages, where 5000 copies of the infringing map had been sold at a profit, but plaintiff waived an accounting and it did not appear that plaintiff's business was materially injured.

Widenski v. Shapiro, Bernstein & Co. Inc., 147 F. (2d) 909 at 911-12 (C.A. 1, 1945) where the Court upheld an award of \$250. statutory damages for infringement of a musical copyright. The plaintiff had an established license fee of \$10. per month or \$90 annually, and defendant argued that the loss of this royalty was *actual provable damages, provable with mathematical certainty*, and that the plaintiff could recover no more. But the Court of Appeals held it was inadequate damages and that the District Court in its discretion had properly awarded statutory damages.

Hartfield v. Peterson, 91 F. (2d) 998 (C.C.A. 2, 1937) where the Court of Appeals affirmed an award of \$5000. statutory damages for infringement of a copyrighted cable and telegraphic code, which defendant had obviously sold at a profit.

Campbell v. Wireback, 269 F. 372 at 375-6 (C.C.A. 4, 1920) where the Court of Appeals upheld an award of \$4000. statutory damages for 4000 infringing copies of advertising cuts of its orthopedic devices, which defendant had copied from plaintiff at an obvious saving to the defendant.

No-Leak-O-Piston Ring Co. v. Norris, 277 F. 951 at 954 (C.C.A. 4, 1921) where the Court of Appeals upheld the award of \$3000 statutory damages for distribution of 15000 copies of an infringing pamphlet, containing information as to piston rings, which defendant had copied from the plaintiff at an obvious saving to the defendant.

It is plain from the foregoing that the intent of Congress was "to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits", as Mr. Justice Roberts said in *Douglas v. Cunningham*, 294 U.S. 207 at 209. The District Courts regularly and properly award statutory damages, in the manner intended by Congress even though some actual damages or actual profits may be ascertainable, where they are so small and inadequate that they do not provide an effective remedy to prevent wilful and flagrant piracy.

Widenski v. Shapiro, Bernstein & Co., 147 F. (2d) 909 (C.C.A. 1, 1945), where \$10. monthly and \$90. yearly was plaintiff's established license fee, and *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F. (2d) 282 (C.C.A. 8, 1939), where defendant admitted actual net profit of \$5.10—are sufficient evidence of this. Obviously in such situations, if the District Court cannot award such statu-

tory damages "as to the Court shall appear to be just" within the limits stated, the effectiveness of the Copyright Act is destroyed and it is reduced to its state of impotency prior to 1909 when unscrupulous persons could infringe copyrights with impunity.

The discretion of course lies with the District Court whether to award statutory damages "in lieu" of actual damages and profits of \$250. up to \$5000. As Judge Booth said in Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823 (C.C.A. 8, 1924) at 829:

"We think election to award what are known as statutory damages in lieu of actual damages vests with the court, and that it is for the court to decide what kind of damages best fits the case. Exercising the authority given by the statute (Sec. 25(b) the court awarded statutory damages. The practice is well established. Westermann v. Dispatch Co., 249 U.S. 100; No-Leak-O-Piston Ring Co. v. Norris, 277 F. 951 (C.C.A. 4, 1921)"

In failing or waiving his right to prove actual damages and profits, (*General Drafting Co. v. Andrews*, 37 F. 2d. 54 at 57 (C.C.A. 2, 1930) the plaintiff, of course, takes his chances on the amount of statutory damages the District Court will award in its discretion between the minimum of \$250. and the maximum of \$5000. In any event, if he proves infringement, he is entitled to the minimum statutory damages of \$250. *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 at 106-107 (1919); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 at 207-8 (1931). But neither can the defendant control the court's discretion and prevent it from awarding statutory damages, by admitting small actual profits which it would be willing to pay—as the defendant sought to do in admitting \$5.10 actual profit in *Johns & Johns Printing Co. v. Paull-Pioneer Music*

Corp., 112 F. 2d. 282 at 283-4 (C.C.A. 8, 1939), and as the Petitioner is trying to do here. Presumably, for instance, the Petitioner here is willing to pay some 2% of its gross profits of \$899.16, or \$17.98. In the present case the Petitioner of course did not prove its *actual* net profits, after deducting selling expenses,—but if it had, or it admits a small amount of actual net profits which it would be willing to pay—it still cannot prevent the District Court in its discretion from awarding such statutory damages “in lieu” thereof as “shall appear to be just”. Unless Section 101(b) is thus construed as Congress intended, its purpose is defeated, and “the ineffectiveness of the remedy” will again certainly encourage “wilful and deliberate infringement” as this Court pointed out in *Douglas v. Cunningham, supra*.

Allowing the District Court the full discretion whether to award actual damages and profits, or in lieu thereof such statutory damages “as to the court shall appear to be just” within the limits stated, as Congress intended, automatically takes care of the easy case where the infringement was innocent, accidental or trifling, and the hard case where the infringement is deliberate, wilful and tainted with perjury and fraud, as in the case at bar. As Mr. Justice Van Devanter said in *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 at 106:

“In other words the court’s conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,”

and as Judge Knapp said in *Campbell v. Wireback*, 269 F. 372 at 376 (C.C.A. 4, 1920) in affirming an award of \$5000. statutory damages:

“The case is an aggravated one in many ways, and the damages inflicted by the unconscionable conduct

of defendants are properly measured, as the quoted decision holds, by 'the Court's conception of what is just'—

We submit that there can be no question whatever as to the power of the District Court to award statutory damages of \$5000. in the circumstances of this case. If Petitioner believes Sec. 101(b) should be changed, its remedy lies with Congress. As Mr. Justice Brandeis said in *Jewell Realty Co. v. Buck* (*supra*) (p. 207-8):

"If, as applied to musical compositions, the provisions of the entire section are proved unreasonable, the remedy lies with Congress."

But we respectfully submit that the facts of the present case do not present a very appealing argument to Congress for changing the law, nor to this Court for destroying the effectiveness of the Copyright Act by construing Sec. 101(b) in the manner contended by Petitioner.

PETITIONER'S CASES (PAGES 13-15) DISTINGUISHED

Sec. 101(b); of course, gives the copyright proprietor the right to recover *actual* damages and *actual* profits, if he can prove them with the certainty required by law. Thus, as in any case where a plaintiff is given a choice of remedies, he is entitled to elect his remedy, and in a copyright case, under Sec. 101(b), he may expressly recover actual damages and profits, if he can prove them, and in that situation is not required to accept statutory damages from \$250. to \$5000., which might be awarded by the Court. Obviously in such a situation, where the plaintiff plainly seeks to recover his actual damages and defendant's actual profits, and waives his right to recover statutory damages, the "in lieu" clause of Sec. 101(b) is not involved. Thus the cases relied on by Petitioner are clearly distinguishable on their facts. There is nothing in the Court of Appeals.

decision below which conflicts with the cases relied on by Petitioner. They are all distinguishable on their facts.

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), the plaintiff was plainly seeking to recover and had proved defendant's *actual profits* of some \$587,000, and had expressly waived his right to statutory damages of \$5000 'in lieu' thereof. Chief Justice Hughes therefore correctly said (p. 399):

"We agree with petitioners that the 'in lieu' clause is not applicable here; as the profits have been proved and the only question is as to their apportionment."

Obviously the "in lieu" clause was not applicable in that case. The plaintiff had elected to recover defendant's *actual profits*, as Section 101(b) expressly permits.

In *Sammons v. Colonial Press, Inc.*, 126 F. (2d) 341 (C.C.A. 1, 1942), the plaintiff clearly sought to prove and recover the *actual profits* made by both Larkin, the publisher, and Colonial Press, the printer. The District Court found that Larkin had made some \$7200 profit, but that the printer had made none. The District Court gave judgment for \$7236 against Larkin and \$250 statutory damages against the printer. On appeal the plaintiff expressly challenged the finding that Colonial Press had made no actual profit, and particularly the allowance of a deduction of \$2936 for "overhead expenses" (p. 348), and in addition sought to make the printer jointly liable for the profits made by Larkin, who apparently was judgment proof. The Court of Appeals affirmed, holding there was no joint liability for Larkin's profits, but remanded the case for further proofs as to the printer's profits, questioning the propriety of the deduction allowed for "overhead expenses" by the printer.

We submit that the case is properly distinguished on its facts in the decision of the Court below (R. pp. 276-279). We submit that the rule there stated was correct, as applied

to the facts of the case, but was not applicable to the different facts of the case at bar. There the plaintiff had elected to recover defendant's *actual* profits, and not statutory damages—even on the appeal. If plaintiff's contentions were correct that the “overhead expenses” were improperly deducted in determining Colonial's profits, it was entitled to recover “actual profits” of \$2936 from Colonial. The plaintiff obviously *did not elect* to recover statutory damages, because the maximum award he could have obtained was \$2812 from both defendants—i.e., 2812 books at \$1 per copy (p. 344). And to recover such statutory damages the plaintiff would have had to surrender its judgment for \$7236 *actual* profits against Larkin. Obviously the facts are different in the present case, where plaintiff waived its right to actual damages and profits, and “in lieu” thereof was awarded statutory damages.

In *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. (2d.) 354 (C.C.A. 9, 1947) suit was brought for infringement of a copyrighted motion picture photoplay. The plaintiff plainly sought actual damages and actual profits, and not statutory damages, the maximum amount of which could only have been \$5000. The District Court awarded actual damages in the amount of \$40,000. and the Court of Appeals affirmed. Obviously, actual damages and profits having been proved there was no occasion for the award of statutory damages. As Judge Stephens said (p. 378):

“Award of statutory damages in the terms of the statute is proper only in the absence of proof of actual damages and profits. The court having found the extent of both, the point fails. The court awarded actual damages, holding the award on that basis as adequate without resorting to the use of statutory damages. We find no error in this course.”

Davilla v. Brunswick-Balke Callender Co., 94 F. (2d) 567 - (C.C.A. 2, 1938), was wrongly decided on its facts and is

contrary to the decision of this Court in *Douglas v. Cunningham*, 294 U.S. 207. The decision of the District Court (Judge Leibell) in 19 F. Supp. 819 (at pp. 819-820) makes it clear that there was no proof of actual damage to the plaintiff, nor of actual profits by the defendant, that 5285 infringing records were sold and that the District Court made the award of \$5000 "as a statutory award of damages in lieu of actual damages and profits." The District Court could have found some *actual* profit, but "in lieu" thereof, and in its discretion, awarded statutory damages instead. At the rate of \$1 per infringing copy, the maximum award of \$5000 was plainly justified under the statute, and could not be reversed on appeal, under *Douglas v. Cunningham*. We submit that the statement in Judge Manton's opinion (p. 570):

"Since the amount of sales was sufficiently proved, there was no basis for an award of statutory damages" —

was clearly wrong. *The amount of sales had to be proved to serve as the basis for awarding statutory damages at the rate of \$1 per infringing copy, just as in Douglas v. Cunningham.*

However, we respectfully submit that this Court should not take up the case at bar, which was rightly decided on its facts, merely to correct the *Davilla* case, which was wrongly decided on its facts, and in which this Court has already denied certiorari (304 U.S. 572). The Court of Appeals herein was not misled by the *Davilla* case, and no other court need be. It is contrary to *Douglas v. Cunningham*.

In *Malsed v. Marshall-Field Co.*, 96 F. Supp. 372 (D.C. W.D. Wash. N.D. 1951), the plaintiff proved no actual damages, but defendant's actual profits of \$100 were proved. But here the District Court (Judge Yankwich) in its dis-

cretion gave judgment to the plaintiff for \$100 defendant's actual profits, obviously because the infringement was innocent and accidental. This, of course, the Court could properly do in its discretion under Section 101(b). The Court with equal propriety could have awarded statutory damages of \$250 — as in *Widenski v. Shapiro, Bernstein Co.* (*supra*, C.C.A. 1, 1945) — or \$500 for 500 infringing labels at \$1 per label.

We respectfully submit, therefore, that the above cases relied on by appellant in support of its position are clearly distinguishable on their facts and present no new rule of law requiring clarification by this Court.

III. REPLY TO PETITIONER'S POINT II.

The Petitioner contends that the decision of the Court of Appeals sanctions departures in overall color, material, size and appearance from a copyrighted work in violation of the Copyright Act.

This point likewise is wholly without merit. It is completely answered by the facts established in this case. These show that the Lepere Pottery Company *directly copied* from one of Respondent's plaster models of its copyrighted Cocker Spaniel in Show Position, similar to PIF's, Exh. 5, which were available on the open market. Lepere used this as a physical model for making the mold from which it reproduced the infringing models sold by Petitioner.

There was no question of law presented, regarding infringement, therefore, and no question of "sanctioned departures from the copyrighted work of art."

There is also no question of monopoly here, nor of "extension of the legalized monopoly." The Lepere Pottery was entirely free to make any sculpture of a Cocker Spaniel in Show Position that it wanted, *if it did its own original work*. Instead Lepere Pottery merely copied and duplicated the plaintiff's copyrighted work. There are in the

Record (Plf's. Exh. 12, R. p. 90 and Plf's. Exh. 14, R. pp. 93-94), two other models of Cocker Spaniels in Show Position which do not infringe Respondent's copyright. The first is by Mr. Press, a sculptor and one of the owners of Respondent Company, made to replace Miss Philbrick's model, and the other is by a competitor, the Mortens Studio. Naturally they differ in details, because both of these sculptors did their own original work. Lepere did not.

It is, of course, elementary that a copyright is not a monopoly — any more than a man's house, his horse, his automobile. Others are free to build houses, acquire horses or automobiles of their own. But they cannot steal property which someone else has created. Lepere Pottery could make its own Cocker Spaniel in Show Position, but it could not steal Respondent's copyrighted work. Petitioner confuses copyright with the physical article embodying the copyright — a distinction preserved in Sec. 27 of the Copyright Act. A copyright is intellectual property and is protected like any other kind of personal property — not because it is a monopoly but because it is the product of a man's mind. As Drone on Copyright well states (p. 4):

"The principle is as old as property itself, that what a man creates by his own labor, out of his own materials, is his own to enjoy to the exclusion of all others."

Blackstone thus defined monopoly:

"A license or privilege . . . whereby the subject in general is restrained from that liberty of manufacturing or trading *which he had before*"

A monopoly takes away from the public the enjoyment of something which the public before possessed. But a copyright (and a patent) does not do this, for it does not apply to anything which the public before possessed. The same specious argument was raised in the recent case of *Alfred Bell & Co. v. Cataldo Fine Arts, Inc.*, 191 F. (2d) 99 (C.A.

2, 1951), which Judge Frank disposed of in the following language (p. 103):

"The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; *similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his. . . . Hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others.*"

And see —

Fred Fisher Inc. v. Dillingham, 298 F. 145, at 150-151 (D.C.S.D.N.Y. 1924).

Lawrence v. Dana, 15 Fed. Cas. 26 at 60.

We respectfully submit that Petitioner's Point II is without merit.

IV. CONCLUSION.

We respectfully submit that the judgment of the Court of Appeals in affirming the judgment of the District Court was correct and fully supported by the evidence of record herein, and that the petition presents no questions of law requiring the exercise of this Court's discretionary jurisdiction, and should be denied.

Respectfully submitted,

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May 1952.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 42.

F. W. WOOLWORTH CO.,
Petitioner,

v.

CONTEMPORARY ARTS, INC.,
Respondent.

BRIEF FOR RESPONDENT.

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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1952.

No. 42

F. W. WOOLWORTH COMPANY,

PETITIONER,

v.

CONTEMPORARY ARTS, INC.,

RESPONDENT.

BRIEF FOR RESPONDENT.

The Court has granted the Petition for Writ of Certiorari in this case "limited to the questions presented by the application of Section 101(b) of Title 17 of the U. S. Code to this case."

I. STATEMENT OF THE CASE.

The copyright involved in this case is an original sculpture and work of art entitled "Cocker Spaniel in Show position", designed in 1942 by Elizabeth Philbrick, who uses the professional name of "Jan Allan". The copyright was duly registered with the Register of Copyrights with deposit of copies, and Certificate No. 39960, Class G. Pub. issued with a publication date of March 26, 1942 (Plf's. Exh. 3, Rp. 252), and was duly assigned to Respondent (Rp. 253). Respondent is a Massachusetts corporation with a place of business in Boston, and is engaged in the

business of designing, manufacturing and selling small sculptured figurines and statuettes. It is a small business, doing \$35,000. gross annually with eight employees (Rp. 110). Their sculptures include dancing and national figures and objects, and authentic dog models, which are sold in art and gift shops and to dog fanciers. Respondent's sculptures are all original designs and great care is taken to make their dog models authentic, realistic and true to type (Rp. 49). Prize winning dogs are studied and dog experts are consulted in creating every dog model. Respondent makes its Cocker Spaniel in Show Position in a red plaster model selling at retail for \$4.00 (Plf's Exh. 5), in red porcelain selling for \$9.00 (Plf's. Exh. 6) and in a fine black and white porcelain selling for \$15.00 (Plf's. Exh. 7). *These three models are one identical sculpture, merely reproduced in different media.* The same sculpture could be cast in metal, if desired. *All models are made from an identical master model.* But different media require different treatments—the porcelain requires glazing for instance—and porcelain shrinks in baking. Porcelain further requires a hard mold, instead of the flexible rubber mold used in making plaster models, and undercuts therefore have to be eliminated to permit removal of the model from its hard mold (Rp. 51-61). Thus, the differences between Respondent's plaster and porcelain models (except for color which, of course, is optional) are due solely to the different techniques and requirements of reproducing in porcelain instead of plaster.

The infringement proved was the sale of ceramic models of Respondent's copyrighted Cocker Spaniel by the Woolworth Company—Plf's. Exh. 1 and Deft's. Exh. A. Respondent's proofs established beyond question that the Woolworth dog was copied directly from one of Respondent's copyrighted dogs by using it as a physical model

(Rp. 61-63; 99; 104-5). The Lepere Pottery Company of Zanesville, Ohio was the manufacturer of the infringing dogs, and had scratched hairlines on the dog's coat in an effort to change its appearance. In casting in ceramic from a hard model, undercutting around the feet had to be removed, and the ceramic model necessarily shrank in baking (Rp. 100-101; 184-191). But otherwise the Petitioner's dogs were identical with Respondent's red plaster model (Plf's. Exh. 5). The Woolworth Company bought 127 dozen of the infringing dogs from the Sabin Mfg. Co. of McKeesport, Pennsylvania which in turn bought them from Lepere Pottery. The Woolworth Company sold the infringing models at \$1.19 retail.

The creation of the original sculpture by Miss Philbrick and its physical copying by the Lepere Pottery Co. was clearly proved, and the validity of the plaintiff's copyright and its infringement could not be disputed.

The only defense was an utterly preposterous story by one Harry Moyer, an employee of the Lepere Pottery Company, that by a remarkable coincidence he himself had created *the identical design* of the Respondent's Cocker Spaniel in Show Position, in 1938, four years earlier than Miss Philbrick. He produced a gray plaster model (Deft's. Exh. F) marked on the bottom "A.M.Co. 1938" and said it was "an exact dog of the one which I made for Burley Pottery in 1938" from an English Cocker Spaniel which had been given to him (Rp. 134). He said he had found the gray plaster model in a cabinet at the Lepere Pottery Co. in the early part of 1950, and that it was there when he became employed by Lepere in 1945. Moyer admitted that he had no sculpturing experience (Rp. 142-152), was not a dog expert, knew nothing about Cocker Spaniels, and that his own English Cocker Spaniel was "very heavy

coated" (Rp. 146) and had never been shown or trimmed for showing purposes. But Miss Philbrick had testified that her own Cocker Spaniel was her effort to create "an ideal *American Cocker Spaniel*", her dog was shown in show position and had been trimmed for showing. The "A.M.Co. 1938" was never explained. Moyer's oral testimony was wholly uncorroborated. Petitioner's gray plaster model (Deft's. Exh. F) however, *is identical in measurement, in length, width and height of head, body, legs and tail and in conformation of hair with plaintiff's plaster model* (Plf's. Exh. 5) as Miss Philbrick showed *when she applied her calipers to the two models* (Rp. 188). Such identity in the minutest detail could not possibly be a coincidence. Petitioner's gray plaster model (Deft's. Exh. F) was obviously copied directly from one of plaintiff's plaster models, such as Plf's. Exh. 5, with hairlines added to avoid the appearance of infringement (Rp. 184-192). The District Court refused to give the Moyer testimony any credence whatever (Opinion Rp. 22-24). The testimony was of course an insult to the Court's intelligence and Moyer was exceedingly fortunate to avoid being held for perjury. The situation was exactly the same as if the copyrighted work had been a travel book, and the defendant contended that by a coincidence he had written the same travel book earlier than the plaintiff, and produced an earlier dated manuscript *identical to the last word* in support of his defense, but had never visited the country in question, and the defense was otherwise wholly uncorroborated.

Moyer's testimony further conflicted with previous statements as to the origin of the infringing Woolworth model (Plf's. Exh. 1) appearing in the letter of the Sabin Company to the Woolworth Company dated October 31, 1949 (Plf's. Exh. 15; Rp. 255) which stated:

"In regard to your recent letter, I am sorry this was not answered sooner, but I have checked quite thoroughly into the matter. We have purchased these molds from a pottery who has been making this dog since 1936.

"Please be advised that he states this was copied from a glass dog made in England. However, he is trying to find the original of this dog and up to the present writing, we have been unable to secure this sample. However, we would like to know when this copyright was put into effect."

No evidence was produced supporting these conflicting statements. But the letter shows that Lepere and Sabin had entirely changed their story in the meantime.

Moyer further testified that he had registered his own copyright on the infringing dog on February 11, 1950 (Rp. 38-39; 155-157). Yet it was asserted that the Lepere Pottery had been selling the infringing models since January 1948 and Sabin Mfg. Co. had sold them to Woolworth in March, April and May 1949, *all without notice of copyright*. (Rp. 134-135, 139; 152-3). It is elementary law of course that any copyrightable work publicly sold without notice of copyright is abandoned to the public and copyright protection cannot thereafter be secured.* Moyer thus

* *Universal Film Mfg. Co. v. Copperman*, 212 F. 301 (D.C.S. D.N.Y. 1914); *aff.* 218 F. 577 (C.C.A. 2, 1914);

Fleischer Studios Inc. v. Ralph A. Freudlich, Inc., 73 F. (2d) 276, at 277 (C.C.A. 2, 1934);

Smith v. Bartlett, 18 F. Supp. 35 at 37 (D.C.D. Me. 1937);

Wildman v. New York Times Co., 42 F. Supp. 412 at 414-415 (D.C.S. D.N.Y. 1941).

Compare:

American Code Co. v. Bensinger, 282 F. 829, 833 (C.C.A. 2, 1922);

Ferris v. Frohman, 223 U.S. 424 at 431, 437 (1911);

Walters v. Lane, L.R. (1900) A.C. 539.

in addition, defrauded the Copyright Office in registering his own copyright on February 11, 1950 and in concealing the fact of the previous sale of his models without notice of copyright from the Copyright Office.

We ask the Court to note that the Woolworth Company has an indemnity agreement with the Sabin Company. Sabin wrote Woolworth (Rp. 256):

"We will go along with you and assume all cost regarding any damage or expense connected therewith."

We further ask the Court to note that Respondent actually suffered *actual damages* from the Woolworth piracy far in excess of \$5000, as Respondent sought to show against the objection of Petitioner's counsel (Fox Rp. 112-121; and Colloquy Rp. 244-249). The Cocker Spaniel was Respondent's largest selling dog and its sales were killed by the Woolworth piracy. Dealers cancelled their orders for Respondent's dog line.

As Mr. Fox testified (Rp. 118):

"We lost two of our big shops out there (Chicago) with the general complaint of copying".

Respondent was then compelled to design a new Cocker (Plf's. Exh. 12) to replace the pirated dog. But even Petitioner admitted the justification for an award of \$5000. statutory damages (Rp. 120):

"The Court: If you establish this was an infringement of copyright, it is inescapably clear there is enough evidence in this case upon which to predicate damage up to \$5000. I don't think Mr. Barnes disagrees with that, do you?

Mr. Barnes: No, your Honor."

But Respondent admittedly was unable to prove its actual damages, from lost sales and the like, with the certainty required by law (see Rpp. 114, 120) and consequently was forced to invoke the Statutory Damage provision of the Copyright Act (Title 17, U.S.C. Sec. 101(b)—which allows the trial Court, *in lieu of actual damages and profits* and in its discretion, to award statutory damages from \$250. to \$5000. at the rate of \$10. per infringing copy (in the case of sculptures and works of art).

Petitioner did not prove its profits. It merely showed that it had bought 1524 of the infringing models, at a cost of 60 cents each and had sold them for \$1.19 each. Petitioner made no effort to prove its selling costs and hence its net profits, which at most would have been about 2% of gross sales. On the facts stated and in its discretion the District Court awarded the plaintiff \$5000. statutory damages (Opinion Rp. 24-25). The District Court also awarded Respondent an attorney's fee of \$2000. cutting Respondent's requested fee of \$3945 (263 hours spent at \$15.00 per hour) approximately in half.

On appeal the Court of Appeals for the First Circuit affirmed the judgment of the District Court and granted Respondent an additional \$500. attorney's fee in the Court of Appeals.

II. THE AMOUNT OF STATUTORY DAMAGES TO BE AWARDED UNDER SECTION 101(b) OF TITLE 17 OF THE U.S. CODE WITHIN THE LIMITS PROVIDED THEREIN IS PURELY DISCRETIONARY. THE \$5000 DAMAGES AWARDED BY THE DISTRICT COURT BEING WITHIN THOSE LIMITS, THERE WAS NO ABUSE OF THE DISTRICT COURT'S DISCRETION IN AWARDING THOSE DAMAGES IN THIS CASE INVOLVING THE SALE OF INFRINGING COPIES OF THE NATURE AND NUMBER HERE SHOWN. THAT PETITIONER MIGHT HAVE PROVED A SMALL AMOUNT OF ACTUAL PROFITS WHICH IT WOULD HAVE BEEN WILLING TO PAY IS IMMATERIAL.

Petitioner contends that the decision below construes the "in lieu" clause of Sec. 101(b) of the Copyright Act in conflict with a decision of the Court of Appeals for the Second Circuit and in probable conflict with decisions of this Court and other Federal Courts. We respectfully submit that the decision below properly construes the "in lieu" clause of Sec. 101(b) in the light of the express language of the statute; the decisions of this Court and other Courts, and the intent and purpose of Congress in writing the statutory damages provision into the Copyright Act, as shown by the history of remedies for copyright infringement in both England and the United States, and by its legislative history.

A. *The Statute.*

The damages section of the Copyright Act (formerly Sec. 25(b), and now Title 17, U.S.C. Sec. 101(b) so far as here material reads:

“(b) Damages and profits; amount; other remedies.

“To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated . . . and such damages shall in no other case exceed the sum of \$5,000. nor be less than the sum of \$250. and shall not be regarded as a penalty”

The language of the Statute is clear and express: The copyright proprietor may recover such actual damages as he “may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement” . . . “or in lieu of actual damages and profits, such damages as to the Court shall appear to be just, and in assessing such damages the Court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages . . . shall not be regarded as a penalty.” Congress thus gave the District Court entire discretion in allowing the copyright proprietor *either actual provable damages and actual provable profits, or statutory damages within the amounts stated*—in an effort to provide an adequate and effective remedy against piracy and willful infringement and to discourage the very contempt of the copyright laws and the courts which Petitioner displays in the present case. And such statutory damages are not to be construed as a penalty.

It was just for such a case as this that Congress in revising the Copyright Act in 1909 added the statutory damage provision. It had been found that *actual damages and profits* were exceedingly difficult to prove in copyright cases and were frequently grossly inadequate, and that the previous Copyright Act was ineffective in preventing piracy of copyrighted works. Here there has been a flagrant piracy of Respondent's copyrighted work, with no bona fide defense. But Petitioner has compelled Respondent to bring suit and has put up a preposterous defense based on perjured testimony. Petitioner's evident purpose is to cause Respondent so much expense that it will never again try to protect its copyrighted designs from Petitioner's piracy.

B. *The Decisions.*

The leading case construing Section 25 (b) now 101(b) of Title 17 U.S.C., is *Douglas v. Cunningham*, 294 U.S. 207 (1935). There, in a copyright infringement suit, 384,000 copies of a Sunday edition of the Boston Post including the infringing story had been published. The plaintiff admitted its inability to prove actual damages, and the District Court (Judge Lowell) awarded maximum statutory damages of \$5000, at the rate of \$1 per infringing copy up to 5000 copies, and an attorney's fee. The Court of Appeals reversed in 72 F. (2d) 536 (Judge Bingham dissenting), holding that, where no actual damages were proved, the Court could award only the minimum statutory damages of \$250. The Supreme Court granted certiorari and reversed the Court of Appeals, restoring the award of \$5000 maximum damages. Mr. Justice Roberts said as to Section 25(b) (pp. 209-210):

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law

imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render *difficult or impossible proof of damages or discovery of profits.** In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. *The ineffectiveness of the remedy encouraged wilful and deliberate infringement.*

"... As the *Westermann* case shows, the law commits to the trier of facts, within the named limits, discretion to apply the measure furnished by the statute provided he awards no more than \$5000. He need not award \$1 for each copy, but, if upon consideration of the circumstances he determines that he should do so, his action can not be said to be unjust. In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute."

In *L. A. Westermann Co. v. Dispatch-Printing Co.*, 249 U.S. 100 (1919), the Court had under consideration the meaning of Section 25, and the amount of damages allowable "in lieu of actual damages and profits." The copyrights were for pictorial illustrations of styles in women's apparel. Mr. Justice Van Devanter said (pp. 106, 107):

*Italics ours throughout this Brief.

“On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be ‘in lieu of actual damages’ shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty* as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than \$5,000 nor less than \$250, . . . In other words, the court’s conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court’s discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.

“Apart from the natural import of its words, the history of the provision makes strongly for this view. . . . In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the ‘in lieu’ provision now under consideration. True, they were broadened

so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained. The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.' Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation."

In *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 (1931), the Court again had before it the "in lieu of" clause of Section 25, there being no proof of actual damages. There the copyright covered a musical composition and the amounts allowable as damages under paragraph 4th, of Section 25(b) were in question. Certain questions were certified from the Circuit Court of Appeals for the Eighth Circuit:

"*Question II.* 'In a case disclosing infringement of a copyright covering a musical composition, *there being no proof of actual damages*, is the court bound by the minimum amount of \$250 set out in the so-called "no other case" clause of Section 25(b) . . . , reading, "and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty?"' "

Mr. Justice Brandeis said (pp. 207, 208):

"The definite specification of a maximum and minimum in every case is not contradicted in any way by these legislative suggestions as to what may be deemed

reasonable allowances in cases falling within the prescribed limitations. See *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 106, 109: [63 L. Ed. 499, 502, 503, 39 S.Ct. 194] If, as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress. Question II is answered in the affirmative."

Question III was as follows:

"Is section 25 (b) Fourth of the Copyright Act (17 U.S.C. [title 17,] Sec. 25) applicable, in the discretion of the Court, to a case disclosing infringement of copyright covering a musical composition, *there being no proof of actual damage?*"

Mr. Justice Brandeis said (p. 208):

"This question has in part been necessarily answered by our discussion of question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, *the minimum allowance of \$250 must be made*. Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. See *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 106. [63 L. ed. 499, 502, 39 S. Ct. 194.] Subject to this limitation, question III is answered in the affirmative."

In the meantime Sec. 101(b) has been liberally construed by the lower courts in the manner intended by Congress,

to give the District Court complete discretion to award actual provable damages and actual provable profits, or where these are difficult to prove or are inadequate, and in lieu thereof, to award statutory damages.

See:

S. E. Hendricks Co. v. Thomas Publishing Co., 242 F. 37 (C.C.A. 2, 1917) where the Court of Appeals upheld the award of \$2500, statutory damages for 2800 copies of an infringing book as within the discretion of the District Court. Judge Heugh there said (p. 41):

"As is well known, the language of this section is a growth of years resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits.

"That keeping plaintiff out of a possible market for 2,800 copies of its own publication, by the issuance of a book competitive in every sense of the word, works some considerable injury, is a matter too plain to require more than statement. *That assessment of damages or ascertainment of profits under the facts hereinabove recited would be not only difficult but expensive is similarly obvious.* We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and (2) to give the new right of application to the court for such damages as shall 'appear to be just', in lieu of actual damages.

"... in the present cause experience informs the court that \$250. would not and could not compensate plaintiff for a damage obvious, but difficult of exact admeasurement. It covers the matter in hand to repeat what we held in the *Mail & Express Case*, supra, that, where obvious and substantial pecuniary injury has been wrought, \$250 is the minimum award, and to approve the above-quoted language of Hand, J. *that the intent of the statute* (under circumstances such as the present) *was to authorize the court to estimate the damages within the statutory limits, without being bound to or by legal proof.*"

Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F. (2d) 282 at 283-4 (C.C.A. 8, 1939) where the Court of Appeals affirmed the award of \$250. statutory damages for printing the lyrics of plaintiff's copyrighted songs, where defendant admitted actual net profit from the infringement of \$5.10.

Toksvig v. Bruce Publishing Co., 181 F. (2d) 664 at 667-8 (C.A. 7, 1950), where the Court upheld an award of \$1000. statutory damages even though the evidence disclosed that the defendant Bruce had sold 14,262 copies of the infringing book at a net profit of 5 to 10 cents per book.

Adventures in Good Eating v. Best Places to Eat, Inc., 131 F. (2d) 809 (C.A. 7, 1942) where the Court upheld an award of \$3500. statutory damages for 3500 copies of the infringing book, which defendant had sold at 50 cents per copy, and obviously at a profit.

General Drafting Co. v. Andrews, 37 F. (2d) 54 (C.C.A. 2, 1930), a map case, where the Court upheld an award of

\$2000. statutory damages. 5000 copies of the infringing map had been sold at a profit, but plaintiff waived an accounting and it did not appear that plaintiff's business was materially injured.

Widenski v. Shapiro, Bernstein & Co., Inc., 147 F. (2d) 909 at 911-12 (C.A. 1, 1945) where the Court upheld an award of \$250. statutory damages for infringement of a musical copyright. The plaintiff had an established license fee of \$10. per month or \$90. annually, and defendant argued that the loss of this royalty was *actual provable damages, provable with mathematical certainty*, and that the plaintiff could recover no more. But the Court of Appeals held it was inadequate damages and that the District Court in its discretion had properly awarded statutory damages.

Hartfield v. Peterson, 91 F. (2d) 998 (C.C.A. 2, 1937) where the Court of Appeals affirmed an award of \$5000. statutory damages for infringement of a copyrighted cable and telegraphic code, which defendant had obviously sold at a profit.

Campbell v. Wireback, 269 F. 372 at 375-6 (C.C.A. 4, 1920) where the Court of Appeals upheld an award of \$4000. statutory damages for 4000 infringing copies of advertising cuts of orthopedic devices, which defendant had copied from plaintiff at an obvious saving to the defendant.

No-Leak-O-Piston Ring Co. v. Norris, 277 F. 951, at 954 (C.C.A. 4, 1921) where the Court of Appeals upheld the award of \$3000 statutory damages for distribution of 15000 copies of an infringing pamphlet, containing information as to piston rings, which defendant had copied from the plaintiff at an obvious saving to the defendant.

Schellberg v. Empringham, 36 F. 2d. 991 at 996 (D.C.S.D. New York 1929) where the District Court (Judge Knox) in a case involving a copyrighted book where plaintiff's damages were difficult to prove awarded statutory damages of \$8000. for two editions of 4000 copies each of the infringing book, plus an attorney's fee of \$2500.

In *Warren v. White & Wyckoff Mfg. Co.*, 39 F. (2d) 922 (D.C. S.D. N.Y. 1930), Judge Hutcheson (of the 5th Circuit) awarded \$1000 statutory damages, saying (p. 923):

"As a result of this unaccountable and inexcusable copying, plaintiff has found it necessary to institute this suit to bring the defendant to book, and it seems to me that, the defendant having led the plaintiff a dance over the matter it, and not the plaintiff, ought to be made to pay the fiddlers and the scot.

"Notwithstanding then that the amount of copying is comparatively small, and that plaintiff has made no proof of actual damage, I am of the opinion that a proper award under the circumstances would be statutory damages of \$1000. together with all costs, and \$1000. as attorney's fees."

C. *Brief History of Principal Copyright Legislation in England and the United States, as relates to Remedies for Infringement.*

1. *England*

Questions relating to copyright in literary works became important only after the invention of printing by Gutenberg in Germany about 1452, and the introduction of that art into England by Caxton about 1474.

The earliest copyright protection took the form of printers' licenses granted by the Crown and no books could

be printed without a Royal grant. In 1556 the Stationers' Company, of printers and book sellers, was chartered by Phillip and Mary, the declared purpose of which was to prevent the propagation of the Protestant Reformation, and by decrees of the Star Chamber the Stationers' Company was given the exclusive right of printing books, and all other printing was prohibited. When the Star Chamber was abolished in 1640, the Licensing Act of 1662 (13 & 14 Car. 2 c.33) again prohibited the printing of any book unless licensed and entered in the register of the Stationers' Company. The act further prohibited any person from printing or importing, without the consent of the owner any book thus registered—thus recognizing the sole property of the author or owner to publish his book. The penalty for piracy was forfeiture of the offending books and 6 shillings and 8 pence for each copy, one-half to the King and one-half to the owner.

The Licensing Act expired in 1679, and for many years the Stationers' Company protected their own books by ordinances applicable to their members alone. Piracy flourished outside, however.* Common law remedies for damages or an injunction were not regarded as adequate, and constant efforts were made to secure statutory protection for copyrights. In a Petition for a Bill to protect copyright, presented in 1709, it was stated:

“The liberty now set on foot of breaking through this ancient and reasonable usage is in no way to be effectually restrained but by an Act of Parliament. For by common law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps, the hundredth part of the damage he suffers; because a thousand counterfeit copies may be dispensed into as many hands

all over the kingdom, and he may not be able to prove the sale of them. Besides, the defendant is always a pauper, and so the plaintiff must lose his costs of suit. (No man of substance has been known to offend in this particular, nor will any ever appear in it). Therefore, the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet, and then he will continue the evil practice with impunity. *We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders.*" (4 Burr. 2318)

1. Statute of 8 Anne c.19 (1709) was the first Copyright Act. The Act gave the author of a book already printed the sole right and liberty of printing it for the term of 21 years after April 10, 1710, and the author of any book thereafter composed the sole right to continue the printing for 14 years, and provided the following penalty:

"that if any other Bookseller, Printer, or other Person whatsoever . . . shall print, reprint, or import . . . any such Book or Books without the Consent of the Proprietor . . . then such offender shall forfeit such Book or Books, and all and every Sheet or Sheets, being part of such Book or Books, to the Proprietor . . . of the Copy thereof, who shall forthwith Damask and make Waste Paper of them; and further, that every such Offender or Offenders shall forfeit One Penny for every Sheet which shall be found in his, her, or their custody, either printed or printing, published or exposed to Sale, contrary to the true Intent and Meaning of this Act; the One Moiety thereof to the Queen's Most Excellent Majesty, and the other Moiety thereof to any Person or Persons that shall sue for the same; to be

recovered in any of Her Majesty's Courts of Record at Westminster by Action of Debt, Bill, Plaint or Information "

While the Statute of 8 Anne and later Acts limited relief to a penalty which could be recovered even by a common informer, it was held that the common law afforded the copyright owner an action for damages, and an injunction, in aid of the statutory right. See:

Beckford v. Hood, 7 T.R. 620 at 627 (K.B. 1798).

Roworth v. Wilkes, 1 Camp. 94 at 98 (K.B. 1807).

Colburn v. Simms, 2 Hare 543 at 559 (Ch. 1843).

Codell v. Robertson, 5 Paton Appeal Cas. 493.

Novello v. Sudlow, 12 C.B. 177, 74 E.C.L. 177. (C.P. 1852).

Cambridge University v. Bryer, 16 East 317. (K.B. 1812).

2. 1734—Engraving Copyright Act (8 George 2 c.13) extended copyright protection to historical or other prints, and imposed upon an infringer the penalty of forfeiture of the plates and sheets upon which the prints were copied, together with 5 shillings for every print found in his custody, one-half to the King and one-half to the person suing.

3. 1777—Prints Copyright Act (17 George 3 c.57) amended the previous Act to give the copyright proprietor *a special action on the case to recover damages and double costs.*

4. 1801—Statute of 41 George 3, c.107 amended the Statute of 8 Anne to give the proprietor of a copyright in a book a special action on the case for *damages*, in addition to the previous penalty of forfeiture.

5. 1814—The Statute of 54 George 3 c.56 extended copyright protection to sculptures, and gave the sculptor a special action on the case to recover *damages*.

6. 1814—The Statute of 54 George 3 c.156 amended the Statute of 8 Anne by increasing copyright protection for books to 28 years, and gave the copyright owner a special action on the case for *damages*, and an action for forfeiture of the books and the sum of 3 pence for every sheet printed, one-half to the King and one-half to the person suing.

7. 1833—The Dramatic Copyright Act (3 and 4 William 4, c.15) gave the author of any drama the sole right of performing it, and by Sec. 2 made the infringer

“liable for each and every such representation to the payment of an amount not less than 40 shillings, *or* the full amount of the benefit or advantage from the performance, *or* the loss or injury sustained by the plaintiff, whichever shall be the greater damages to the author”,—

together with double costs. This was the first provision in the English Copyright Law for *statutory damages* and it was coupled with an alternative right to recover plaintiff's *actual damages*, or the defendant's *profits* —“whichever shall be the greater damages to the author”. The provision was held to be remedial and not penal in *Adams v. Bally* 18 Q.B.D. 625 (1887). Day, J. said (p. 628):

“It is scarcely ever possible for the owner of the sole dramatic representation to prove by evidence the precise amount of the damage he has suffered, and therefore the statute has reasonably provided various measures of damages *any one of which he may adopt*.

If he cannot prove the actual damage he has suffered, he may prove the amount of profit which the offender has made and recover that as damages; and, if he cannot prove that, he may say that his damages are 40 shillings, and recover that amount. I am of the opinion that this sum of 40 shillings is not a penalty."

And on appeal Lord Esher M.R. said (P. 629-630):

"I think it is clear that this payment is treated in the Act as a payment by way of damages and not by way of penalty. It is imposed not as a punishment upon the defendant, but as compensation to the plaintiff."

See also:

Chatterton v. Cave, 3 App. Cas. 482, 492 (discussed in *Brady v. Daly*, 175 U.S. 148 at 157 (1899)).

8. 1842—The Literary Copyright Act (5 and 6 Vict. c.45) repealed the statute of 8 Anne and amending Acts, made the period of copyright protection for books the life of the author and seven years thereafter, with a minimum of 42 years, and extended copyright protection to music. The Act gave the copyright proprietor *an action for damages* by special action on the case, and the right to seize the infringing books by an action of detinue, or to recover their value by an action of trover. Imported infringing books were also subject to forfeiture and the importer made subject to forfeit 10 pounds and double the value of every book imported. In *Cooper v. Whittingham* 15 Ch. D. 501 (1880) it was held that the plaintiff was also entitled to an injunction against selling.

This Act gave the same remedies for infringing musical performances which had been granted by the Dramatic

Copyright Act of 1833 (above). But by the Act of 1888 (51 and 52 Vict. c. 17) the penalty or damages to be awarded for unauthorized performance of a musical composition was changed and made such sum "as shall, *in the discretion of the court or judge before whom such action . . . shall be tried, be reasonable*, and the court or judge . . . may award a less sum than 40 shillings, . . . or a nominal penalty, or nominal damages, *as the justice of the case may require*".

9. 1862—The Fine Arts Copyright Act (25 and 26 Vict. c. 68) extended copyright protection to paintings, drawings and photographs, and made the infringer subject to forfeit to the copyright proprietor a sum not exceeding 10 pounds and all copies of the infringing work, and in addition the copyright proprietor could recover *damages* by special action on the case, seize the infringing copies, and recover damages for their retention or conversion. In *Carlton Illustrators v. Coleman & Co.* (1911) 1 K.B. 771 at 782 it was held that the plaintiff was also entitled to an injunction.

10. 1911—The present Copyright Act (1 and 2 George 5, c. 46) repealed existing copyright legislation with minor exceptions and embodied all copyright protection in one comprehensive Act. Penalties were abandoned. The owner of copyright is given the right to an injunction, damages for infringement, and an account (of profits)—(Sec. 6). All infringing copies of a work are deemed to be the property of a copyright owner who in addition can seize the copies or recover damages for their retention or conversion (Sec. 7). By Sec. 11 wilfull infringement is also made a criminal offense, the offender to be subject to a fine of 40 shillings for every copy dealt with, but not exceeding 50 pounds, and for subsequent offenses to imprisonment for not more than two months.

2. The United States

1. Copyright legislation in the United States began with State Copyright Acts, enacted pursuant to a recommendation of Congress in 1783. All were based on the English Statute of 8 Anne (1709). The Massachusetts Act of March 17, 1783 is typical. Its preamble stated:

"Whereas, the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness greatly depend on the efforts of learned and ingenious persons, in the various arts and sciences; as the principal encouragement such persons can have, to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind; therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind, be it enacted," etc.

The statute provided that, the offender

"shall forfeit and pay a sum not exceeding Three Thousand Pounds, nor less than Five Pounds to the use of such Author . . . , to be recovered by action of Debt in any Court of Record proper to try the same."
(1 Law Mass. 94)

Similar copyright acts were passed by all the thirteen original states except Delaware.

2. After the adoption of the Federal Constitution, the first Congress, by Act of May 31, 1790 c. XIV. enacted the first Federal Copyright Act. It is based upon and is practically a copy of the English Statute of 8 Anne (1709). It gave the author of any map, chart or book the sole right and liberty of printing, reprinting, publishing and vending such map, chart, or book for a term of 14 years. Sec. 2 provided the penalty, that

“Such offender or offenders shall forfeit all and every copy and copies of such map, chart, book or books, and all and every sheet and sheets, being part of the same, . . . to the author or proprietor of such map, chart, book or books, who shall forthwith destroy the same. And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed for sale, contrary to the true intent and meaning of this act, the one moiety thereof to the author or proprietor of such map, chart, book or books who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable.”

This remedy, of course, was strictly a penalty.

By Sec. 6 any person who should print or publish any *manuscript* without the consent and approbation of the author or proprietor was made liable “to suffer and pay to said author or proprietor *all damages* occasioned by such injury, to be recovered by a special action on the case, founded upon this act, in any court having cognizance thereof.

3. The Act of April 29, 1802 extended copyright protection to prints, cuts and engravings. The remedies provided were penalties similar to those provided in the previous Copyright Act of 1790.

4. The Act of Feb. 15, 1819 (3 Stat. at page 481) extended the jurisdiction of the Circuit Courts of the United States to cases arising under the patent and copyright laws, and specifically authorized the courts to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable". Under this Act recovery of *profits* was allowed in equity in both patent and copyright cases as appropriate equitable relief incident to a decree for an injunction (without specific statutory provision therefor). See:

Stevens v. Gladding, 17 How. 447 at 455 (1854).

Sheldon v. Metro-Goldwyn Pictures Corp. 309 U.S. 390 at 399 (1940).

Falk v. Gast Lithographing Co., 54 Fed. 890 at 894 (C.C.A. 2, 1893).

Dam v. Kirk La Shelle Co., 175 F. 902, 908-9 (C.C.A. 2, 1910).

Hartford Printing Co. v. Hartford Directory Co., 146 F. 332 at 336, (C.C.D. Conn. 1906).

5. The Act of February 3, 1831 repealed the previous Copyright Acts and gave copyright protection to books, maps, charts, musical compositions, prints and engravings for a term of 28 years, with the right of renewal for 14 more years. The remedy provided for the infringement of books (Sec. 6) was forfeiture of the infringing copies to the

copyright owner, and 50¢ for every infringing sheet found in the infringer's possession, one-half to the copyright owner and one-half to the United States, to be recovered by an action of debt. This section being penal was strictly construed—*Backus v. Gould*, 7 How. 798 at 811 (1849). The remedy for infringement of prints, cuts, engravings, maps, charts or musical compositions was forfeiture of the plates and of every infringing sheet to the copyright proprietor, and one dollar for every infringing sheet found in the infringer's possession, or printed or exposed for sale, one-half to the copyright proprietor, and one-half to the United States. Any person wrongfully publishing a manuscript was also made liable to pay all damages occasioned by the injury, to be recovered by special action on the case, and to an injunction.

6. The Act of August 18, 1856 (c. CLXIX) extended copyright protection to the author of any drama, giving to the author the sole right of performing it. The infringer was made liable for damages to be recovered by action on the case with costs of suit—

“such damages in all cases to be rated and assessed at such sum not less than One hundred dollars for the first, and Fifty dollars for every subsequent performance as to the Court having cognizance thereof shall appear to be just,” Provided, nevertheless, That nothing herein enacted shall . . . restrict in any way the right of such author to process in equity in any Court of the United States for the better nad further enforcement of his rights.”

This is the first provision in a United States Copyright Act for *statutory damages*, and is obviously based on the

English statute of 3 and 4 William 4c. 15 (1833) referred to above.

This same provision (which became R.S. 4966) was construed by this Court in *Brady v. Daly*, 175 U.S. 148 (1899). The plaintiff there sued to recover damages generally, placed at \$13,700 as discovered in a previous suit in equity, under RS4966. The District Court gave judgment to the plaintiff for *statutory damages* of \$6300. for 126 performances at \$50. for each performance within the two year statute of limitations. The Court of Appeals for the Second Circuit affirmed, and this Court affirmed on writ of error. *This Court held that the remedy granted by RS4966 was remedial and not penal.* Mr. Justice Peckham said of RS4966 (and the similar provisions in the Acts of 1870 and 1856) (p. 154-5):

“These statutes, it will be perceived, all use the word ‘damages’ when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. *It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor the right to recover the damages which he has sustained therefrom.*

The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. *In the face of the difficulty*

of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor.' This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue. It has nothing in the nature of a qui tam action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture."

(p. 156-157):

"Where the statute provides in terms, as the one before us does, for a recovery of damages for an act which violates the rights of the plaintiff and gives the right of action solely to him, the fact that it also provides that such damages shall not be less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute."

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear

such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

7. The Act of July 8, 1870 (Ch. CCXXX) (and Revised Statutes Sec. 4956-4971) made a general revision of the copyright laws, repealing all existing laws but protecting the same works previously protected, and extending copyright protection to paintings, drawings, chromos, statues, statuary, and models and designs intended to be perfected as works of the fine arts. The Copyright Act of 1870 shortly thereafter (1874) became incorporated with minor changes into the Revised Statutes, as Sections 4956-4971, and the Act is most readily considered by its Revised Statutes sections. The remedy provided for infringement of copyrighted books (R.S. 4964) read:

"Sec. 4964. Every person who . . . shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

By R.S. 4965 the remedy for infringement of a copyrighted map, chart, musical, composition, print, engraving, chromo, painting, drawing, statuary, or model intended to be perfected and executed as a work of the fine arts, read:

"Sec. 4965. If any person . . . shall sell or expose to sale any copy of such map or other article as aforesaid,

he shall forfeit to the proprietor the plates on which the same shall be copied and every sheet thereof, either copied or printed, *and shall further forfeit One dollar for every sheet* of the same found in his possession, either printed, copied, published, imported or exposed for sale; *and in the case of a painting, statue, or statutory, he shall forfeit Ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States . . .* Provided further, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of fine arts of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. *One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."*

R.S. 4966 provided a remedy for unauthorized public performance of a copyrighted dramatic composition:

"Sec. 4966. Every person who shall print or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just."

This Section continued the statutory damages of the Act of August 18, 1856 (above), and is the Section construed by this Court in *Brady v. Daly* (above).

R.S. 4967 provided for unauthorized printing of a manuscript and read:

“Sec. 4967. Every person who shall print or publish any manuscript whatever without the consent of the author or proprietor first obtained, shall be liable to the author or proprietor for all damages occasioned by such injury.” (26 Stat. at Large, 1109.)

By R.S. 4970 all actions under the Copyright laws were made cognizable in equity as well as at law, and the courts were given power in a bill in equity, to grant injunctions.

R.S. 4964 for books provided both a penalty of forfeiture of the infringing copies, and *actual damages*. In the United States actions for damages in copyright cases were not allowed as in England, unless specifically authorized by statute. In addition, damages could not be recovered in equity, the Statutes not having enlarged the equitable jurisdiction in copyright cases, as they had in patent cases. See:

Social Register Assn. v. Murphy, 129 F. 148 (C.C.D. R.I. 1904).

Chapman v. Ferry, 12 F. 693 at 695-6 (C.C.D. Oreg. 1882).

Fishel v. Lueckel, 53 F. 499 (C.C.D. N.Y. 1892).

But in *West Publishing Co. v. Edward Thompson Co.*, 176 F. 833 at 839 (C.C.A. 2, 1910) the Court allowed plaintiff to recover his damages under the analogy of the patent statute (R.S. 4921).

The remedies provided under R.S. 4965, however, were penal, and were held not to permit recovery of damages. Thus in *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1907) an action to recover damages for infringement of copyrighted maps was dismissed. Mr. Justice Day said as to R.S. 4965 (p. 365):

“The Copyright Statute indicates that the purpose of Congress was not only to create the rights granted in the statute, but also to create the specific remedies by which alone such rights may be enforced.”

This Court further said (p. 364):

“... the American Copyright act does give special remedies to the owner of a copyright of maps. Inadequate it may be to fully protect the property in the copyright, yet (it is) such as Congress has seen fit to give, and which it, not the courts, has power to enlarge by amendment of the statutes.”

In *Bolles v. Outing Company*, 175 U.S. 262 (1899) this Court held that R.S. 4965 as a penal statute was to be strictly construed, that the plaintiff could recover the penalties only for copies found in the defendant's possession, and could not recover for copies of prints already sold and circulated. Mr. Justice Brown said (p. 264):

“This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually sustained by him, or of the profits realized by the defendant, and in the further provision that one-half of the amount recovered shall be to the use of the United States. It makes no pretence of awarding damages, and simply imposes a forfeiture of a specified sum. In this respect

it differs wholly from the following section (4966) recently considered by us in *Brady v. Daly* (175 U.S. 148)."

See also:

Thornton v. Schreiber, 124 U.S. 612 (1887).

Ohman v. City of New York, 168 F. 953 at 958 (C.C.S.D. N.Y. 1909).

On the other hand, the statutory damages provision of R.S. 4966 relating to dramatic compositions was held to be remedial, and not penal by this Court in *Brady v. Daly*, 175 U.S. 148 (1899) (above).

8. The Act of March 4, 1909 was a general revision of the Copyright Act of 1870, and is the Copyright Act involved in this suit. It has now been codified and enacted into positive law by the Act of July 30, 1947 (61 Stat. 652), under Title 17 United States Code, and Sec. 25(b) of the Act of March 4, 1909 has become Sec. 101(b) of Title 17 U.S. Code. Sec. 101(b) has been printed above (p. 8), so far as here material, and need not be repeated:

The Copyright Act of 1909 abandoned penalties and forfeitures entirely as remedies for infringement. It permits the plaintiff to recover in one action his *actual damages*, the defendant's *actual profits*, "or in lieu of actual damages and profits such damages as to the court shall appear to be just, . . . and such damages shall in no other case exceed the sum of \$5000, nor be less than the sum of \$250, and shall not be regarded as a penalty." In addition, Sec. 104 of Title 17, U.S. Code provides a criminal remedy, making willful infringement for profit a misdemeanor, punishable by a

fine of \$100 to \$1000, and imprisonment not exceeding one year.

It is apparent from the foregoing that there has been a clear distinction in the remedies provided for enforcement of the Copyright Laws in England and the United States from the beginning—between penalties and forfeitures, actions for the recovery of damages and of the infringer's profits, and statutory damages. Frequently they existed together in the same Act, as in the U. S. Act of 1870. Penalties and forfeitures were the first remedies provided. Then actual damages in some cases, and an injunction with recovery of defendant's profits in equity, and finally statutory damages, "in lieu of actual damages and profits". The forfeitures of books and money at a stated rate are, of course, penalties and strictly construed. The remedies for actual damages at law and for the defendant's profits in equity are, of course, remedial. Likewise the remedy for recovery of statutory damages is remedial. *Brady v. Daly*, 175 U.S. 148 at 154-7 (1899) is *conclusive on this point*. As Mr. Justice Peckham said in this case (p. 157), in speaking of the statutory damage provision in the English Statute of 3 and 4 William 4 c. 15:

"In *Chatterton v. Cave*, L.R. 3 App. Cas. 483, 492, the court in speaking of this provision for damages said that the same 'was no doubt fixed, *because of the difficulty of proving with definiteness what amount of actual damage had been sustained by perhaps a single performance at a provincial theater of a work belonging to a plaintiff*, while at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it.' This does not look as if that statute were regarded by the English courts as one of a penal nature, but, on the con-

trary, as one of a remedial kind providing for the recovery of the damages sustained by the plaintiff, and providing for the recovery of a minimum sum for the reason, as stated by the court, of the difficulty of proving with definiteness in all cases the amount of damages which plaintiff really had suffered."

And see also, *Adams v. Batly*, 18 QBD 625 at 628 and 629-630 (1887) (*supra*).

D. *The Legislative History of Sec. 101(b) of Title 17, U.S. Code.*

The defects and limitations of the previous Copyright Act of 1870 (Revised Statutes 4956-4971) as pointed out above, and the statutory damages provision of R.S. 4966 and the decision of this Court in *Brady v. Daly* were obviously very much in the minds of the draftsmen of the copyright legislation which became the Copyright Act of March 4, 1909, now in force. However, R.S. 4966 had provided merely a *minimum* for the statutory damages which could be awarded, for infringement of dramatic compositions—\$100. for the first performance and \$50. for each subsequent performance. The penalties and forfeitures of the Copyright Act of 1870 were obviously inadequate. Recovery of actual damages was allowed only in the case of books and manuscripts. Recovery of defendant's actual profits was allowed as incident to an injunction. But if actual damages and profits were difficult or impossible to prove, there could be no recovery. And statutory damages were limited to dramatic compositions.

The old law was singularly ineffective in providing any substantial remedy to prevent infringement. The court

was obliged to award merely nominal damages* and the plaintiff had to go to large expense in many cases for legal services. Complaints and criticisms of the ineffectiveness of the old law were many.

The Print Publishers of America addressed a memorandum to the Joint Committees on Patents which appears in the publication "Arguments Before the Committees on Patents in the Senate and House of Representatives Conjointly. On the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyrights, December 7, 8, 9, 10 and 11, 1906," which reads in part as follows (p. 106):

"Under the present law it is notorious that there are no effective remedies for piracy in 90 percent of the cases that arise. In our domain recoveries are so rare that general contempt of the law exists . . . The impunity with which the present law can be violated has encouraged infringements in this country to such an extent that many of the infringers have come to look upon their appropriations as vested rights. Naturally they are disturbed when effective remedies are proposed.

"Nor should we leave this session without sug-

* The rule of the common law that actual damages must be proved and, if unable to be proved, nominal damages only could be awarded is illustrated in—

Coupe v. Royer, 155 U.S. 565

Birdsall v. Coolidge, 93 U.S. 64

Rude v. Westcott, 130 U.S. 152

Dobson v. Hartford Carpet Co., 114 U.S. 439

and in copyright cases, see:

Gilmore v. Anderson, 42 F.267 (C.C.S. D.N.Y. 1890)

D'Ole v. Kansas City Star Co., 94 F. 840 at 841 (C.C.W.D.Mo. 1899).

gesting a most important point. The very nature of copyright property is such that many cases arise in which it is impossible to adequately measure the damages. . . . The difficulty of proving with definiteness actual pecuniary damages sustained has been recognized and *Congress has frequently provided statutory rates of compensation*. This has been approved by the Supreme Court (see *Brady v. Daly*, 175 U.S. 148.)”

As a result of the widespread criticism, the Copyright Act, and particularly the section relating to damages, was revised throughout by committees of persons interested in the protection of literary property, under the direction of the Librarian of Congress. The common-law rule as to the recovery of *actual* damages was retained, and *actual profits* was added, but, “*in lieu of actual damages and profits*,” the Court was given the discretion to award “such damages as to the court shall appear to be just,” within certain limits, and at an enumerated rate per infringing copy or performance. And it was expressly provided that these statutory damages shall not be construed as a *penalty*.

Arthur Steuart, Esq., of the Baltimore Bar, Chairman of the Advisory Committee from the American Bar Association, who was a member of the Committee which drafted S. 6330, discussed the various provisions of the proposed Copyright Law in hearings before the Joint Committees on Patents of the Senate and House in 1906. (S. 6330, re-introduced in the Senate in 1909 as S. 9440, became with minor changes the present Copyright Act of March 4, 1909.) His remarks can be found in “Arguments Before the Committees on Patents . . .” (*supra*). Mr. Steuart said as to section 23, now Section 25:

(Page 176:) "The language of the Section 'In lieu of actual damages and profits, such damages as to the court shall appear just.' would appear to put into the court the absolute right where it was an equity case, to decide what should be allowed in the way of liquidated damages, subject of course, to the limitations that it must not be less than \$250 nor more than \$5000, and that the amount which the court should determine should be decided by a computation of so much per copy according to the number of copies found . . ."

(Page 177:) "... It does seem to me very desirable that in this section in which we are trying to preserve the discretion of the court, the independent judgment of the court, we are trying to give to the court the power to assess liquidated damages, which will not be penal and will not be fixed. The court ought to have absolute discretion as to how much will be allowed as liquidated damages, in order that we may avoid all possible danger of creating a penal provision for the punishment of this kind of infringement. It seems to me that the words as they are used in the dramatic section, (R.S. 4966) 'such damages as appear to the court just' will certainly preserve the discretion of the court and give to the court the entire control over the whole question in a way that will avoid any possible danger of the act being construed to be penal."

E. The Proper Construction of Sec. 101(b), As Intended by Congress.

The Act of March 4, 1909 abandoned penalties and forfeitures entirely and adopted the remedies of recovery of actual damages and actual profits, but in addition and as an alternative remedy, extended the recovery of statutory

damages to all types of copyrighted works and gave the trial court the right to award statutory damages, ranging from a minimum of \$250. to a maximum of \$5000, at varying rates for each type of copyrighted work. But the copyright owner can still recover his actual damages and the defendant's actual profits, if he can prove them, but if not and "in lieu thereof" he can recover statutory damages within the amounts above stated which may be awarded by the court. As pointed out above, the reason for permitting the award of statutory damages was the difficulty of proving actual damages or the defendant's actual profits with the certainty required by law, and which actual damages and profits in many cases would be inadequate to prevent willful infringement.

But the two remedies of recovery of actual damages and actual profits, or statutory damages are separate and distinct. If the plaintiff can prove his actual damages and defendant's actual profits he is entitled to recover them. If it is difficult to prove them or they are inadequate, the trial court in its discretion can award statutory damages within the amount stated. *The right to award statutory damages is in no way dependent upon the fact that there might have been some actual damages or actual profits which the plaintiff might have recovered.* The two remedies are entirely independent, and alternative. The Court can award one or the other; it cannot award both.

But where the actual damages or actual profits are less than \$250. we respectfully submit that it is plain that the trial court should award at least the minimum of \$250. statutory damages, because any amount less than that was plainly regarded by Congress as inadequate damages for copyright infringement — just as in the English Act of 1833 (3 and 4 William 4, c. 15) "whichever shall be the greater damages to the author." This is of course the

standard practice in cases involving infringement of musical copyright—*Jewel LaSalle Realty Co. v. Buck*, 283 U.S. 202, 207-8.

It is plain from the foregoing that the intent of Congress was "to give the owner of a copyright some recompense for injury done him, in a case *where the rules of law render difficult or impossible proof of damages or discovery of profits*", as Mr. Justice Roberts said in *Douglas v. Cunningham*, 294 U.S. 207 at 209. The District Courts regularly and properly award statutory damages, in the manner intended by Congress, *even though some actual damages or actual profits may be ascertainable*, where they are so small and inadequate that they do not provide an effective remedy to prevent willful and flagrant piracy.

Widenski v. Shapiro, Bernstein & Co., 147 F. (2d) 909 (C.C.A. 1, 1945), where \$10. monthly and \$90. yearly was plaintiff's established license fee, and *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F. (2d) 282 (C.C.A. 8, 1939), where defendant admitted actual net profit of \$5.10—are sufficient evidence of this. Obviously in such situations, if the District Court cannot award such statutory damages "as to the Court shall appear to be just" within the limits stated, the effectiveness of the Copyright Act is destroyed and it is reduced to its state of impotency prior to 1909 when unscrupulous persons could infringe copyrights with impunity.

The discretion of course lies with the District Court whether to award statutory damages "in lieu" of actual damages and profits of \$250. up to \$5000. As Judge Booth said in Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823 (C.C.A. 8, 1924) at 829:

“We think election to award what are known as statutory damages in lieu of actual damages rests with the court, and that it is for the court to decide what kind of damages best fits the case. Exercising the authority given by the statute (Sec. 25(b) the court awarded statutory damages. The practice is well established. *Westermann v. Dispatch Co.*, 249 U.S. 100; *No-Leak-O-Piston Ring Co. v. Norris*, 277 F. 951 (C.C.A. 4, 1921)”

In failing or waiving his right to prove actual damages and profits, (*General Drafting Co. v. Andrews*, 37 F. 2d. 54 at 57 (C.C.A. 2, 1930) the plaintiff, of course, takes his chances on the amount of statutory damages the District Court will award in its discretion between the minimum of \$250. and the maximum of \$5000. In any event, if he proves infringement, he is entitled to the minimum statutory damages of \$250. *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 at 106-107 (1919); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 at 207-8 (1931). But neither can the defendant control the court's discretion and prevent it from awarding statutory damages, by admitting small actual profits which it would be willing to pay—as the defendant sought to do in admitting \$5.10 actual profit in *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 112 F. 2d. 282 at 283-4 (C.C.A. 8, 1939), and as the Petitioner is trying to do here. Presumably, for instance, the Petitioner here is willing to pay some 2% of its gross profits of \$899.16, or \$17.98. In the present case the Petitioner of course did not prove its actual net profits, after deducting selling expenses,—but if it had, or it admits a small amount of actual net profits which it would be willing to pay—it still cannot prevent the District Court in its discretion from awarding such statutory damages “in lieu”

thereof as "shall appear to be just". Unless Section 101(b) is thus construed as Congress intended, its purpose is defeated, and "the ineffectiveness of the remedy" will again certainly encourage "wilful and deliberate infringement" as this Court pointed out in *Douglas v. Cunningham, supra*.

Allowing the District Court the full discretion whether to award actual damages and profits, or in lieu thereof such statutory damages "as to the court shall appear to be just" within the limits stated, as Congress intended, automatically takes care of the easy case where the infringement was innocent, accidental, or trifling, and the hard case where actual damages were heavy but difficult to prove, and the infringement is deliberate, willful and tainted with perjury and fraud, as in the case at bar. As Mr. Justice Van Devanter said in *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 at 106:

"In other words the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,"

and as Judge Knapp said in *Campbell v. Wireback*, 269 F. 372 at 376 (C.C.A. 4, 1920) in affirming an award of \$5000. statutory damages:

"The case is an aggravated one in many ways, and the damages inflicted by the unconscionable conduct of defendants are properly measured, as the quoted decision holds, by 'the Court's conception of what is just'—

We submit that there can be no question whatever as to the power of the District Court to award statutory dam-

ages of \$5000. in the circumstances of this case. If Petitioner believes Sec. 101(b) should be changed, its remedy lies with Congress. As Mr. Justice Brandeis said in *Jewell-La Salle Realty Co. v. Buck* (*supra*) (p. 207-8):

"If, as applied to musical compositions, the provisions of the entire section are proved unreasonable, the remedy lies with Congress.

But we respectfully submit that the facts of the present case do not present a very appealing argument to Congress for changing the law, nor to this Court for destroying the effectiveness of the Copyright Act by construing Sec. 101(b) in the manner contended by Petitioner.

To those who would contend that the award of statutory damages between \$250. and \$5000. is unreasonable we respectfully point out that Congress regarded these amounts as reasonable in 1909. The Court will undoubtedly take judicial notice of the fact that since 1909 there has been a vast inflation, and decline in the purchasing power of the dollar. According to official Department of Labor statistics, the "Cost of Living Index" since 1913, the earliest year for which statistics are available, to 1951 has arisen 2.9 times, and with increased taxation, \$22,650 is now required to equal the purchasing power of \$5000. in 1909.

III. PETITIONER'S CASES DISTINGUISHED

Sec. 101(b), of course, gives the copyright proprietor the right to recover *actual* damages and *actual* profits, if he can prove them with the certainty required by law. Thus, as in any case where a plaintiff is given a choice of remedies, he is entitled to elect his remedy, and in a copyright case, under Sec. 101(b), he may expressly recover

actual damages and profits, if he can prove them, and in that situation is not required to accept statutory damages from \$250. to \$5000., which might be awarded by the Court. Obviously in such a situation, where the plaintiff plainly seeks to recover his actual damages and defendant's actual profits, and waives his right to recover statutory damages, the "in lieu" clause of Sec. 101(b) is not involved. Thus the cases relied on by Petitioner are clearly distinguishable on their facts. There is nothing in the Court of Appeals decision below which conflicts with the cases relied on by Petitioner, (with the one exception noted below). They are all distinguishable on their facts..

In *Sheldon v. Metro-Golwyn Pictures Corp.*, 309 U.S. 390 (1940), the plaintiff was plainly seeking to recover and had proved defendant's *actual profits* of some \$587,000, and had expressly waived his right to statutory damages of \$5000 'in lieu' thereof. Chief Justice Hughes therefore correctly said (p. 399):

"We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have been proved and the only question is as to apportionment."

Obviously the "in lieu" clause was not applicable in that case. The plaintiff had elected to recover defendant's *actual profits*, as Section 101(b) expressly permits.

In *Sammons v. Colonial Press, Inc.*, 126 F. (2d) 341 (C.C.A. 1, 1942), the plaintiff clearly sought to prove and recover the *actual profits* made by both Larkin, the publisher, and Colonial Press, the printer. The District Court found that Larkin had made some \$7200 profit, but that the printer had made none. The District Court gave judgment

for \$7236 against Larkin and \$250 statutory damages against the printer. On appeal the plaintiff expressly challenged the finding that Colonial Press had made no actual profit, and particularly the allowance of a deduction of \$2936 for "overhead expenses" (p. 348), and in addition sought to make the printer jointly liable for the profits made by Larkin, who apparently was judgment proof. The Court of Appeals affirmed, holding there was no joint liability for Larkin's profits, but remanded the case for further proofs as to the printer's profits, questioning the propriety of the deduction allowed for "overhead expenses" by the printer.

We submit that the case is properly distinguished on its facts. There the plaintiff had elected to recover defendant's *actual* profits, and not statutory damages—even on the appeal. If plaintiff's contentions were correct that the "overhead expenses" were improperly deducted in determining Colonial's profits, it was entitled to recover "actual profits" of \$2936 from Colonial. The plaintiff obviously *did not elect* to recover statutory damages, because the maximum award he could have obtained was \$2812 from both defendants—i.e., 2812 books at \$1 per copy (p. 344). And to recover such statutory damages the plaintiff would have had to surrender its judgment for \$7236 *actual* profits against Larkin. Obviously the facts are different in the present case, where plaintiff waived its right to actual damages and profits, and "in lieu" thereof was awarded statutory damages.

In *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. (2d.) 354 (C.C.A. 9, 1947) suit was brought for infringement of a copyrighted motion picture photoplay. The plaintiff plainly sought actual damages and actual profits, and not statutory damages, the maximum amount of which could only have been \$5000. The District Court awarded

actual damages in the amount of \$40,000. and the Court of Appeals affirmed. Obviously, actual damages and profits having been proved there was no occasion for the award of statutory damages. As Judge Stephens said (p. 378):

"Award of statutory damages in the terms of the statute is proper only in the absence of proof of actual damages and profits. The court having found the extent of both, the point fails. The court awarded actual damages, holding the award on that basis as adequate without resorting to the use of statutory damages. We find no error in this course."

Davilla v. Brunswick-Balke Callender Co., 94 F. (2d) 567 (C.C.A. 2, 1938), was wrongly decided on its facts and is contrary to the decision of this Court in *Douglas v. Cunningham*, 294 U.S. 207. The decision of the District Court (Judge Leibell) in 19 F. Supp. 819 (at pp. 819-820) makes it clear that there was no proof of actual damage to the plaintiff, nor of actual profits by the defendant, that 5285 infringing records were sold and that the District Court made the award of \$5000 "as a statutory award of damages in lieu of actual damages and profits." The District Court could have found some *actual* profit, but "in lieu" thereof, and in its discretion, awarded statutory damages instead. At the rate of \$1 per infringing copy, the maximum award of \$5000 was plainly justified under the statute, and could not be reversed on appeal, under *Douglas v. Cunningham*,

We submit that the statement in Judge Manton's opinion (p. 570):

"Since the amount of sales was sufficiently proved, there was no basis for an award of statutory damages"—

was clearly wrong. *The amount of sales had to be proved to serve as the basis for awarding statutory damages at the rate of \$1 per infringing copy, just as in Douglas v. Cunningham.*

Again *Washingtonian Pub. Co. Inc. v. Pearson*, 140 F. (2d) 465 (C.A.D.C. 1944) is clearly distinguishable on its facts. There plaintiff sought to prove and recover the author's, publisher's and printer's *actual profits*. The District Court awarded plaintiff the apportioned actual profits and not statutory damages. Of course in that situation the plaintiff cannot complain that the District Court did not award statutory damages, because the statute (Sec. 101(b)) gives the District Court the complete discretion whether to award actual damages and profits *or* statutory damages.

In *Malsed v. Marshall Field Co.*, 96 F. Supp. 372 (D.C. W.D. Wash. N.D. 1951), the plaintiff proved no actual damages, but defendant's actual profits of \$100 were proved. But here the District Court (Judge Yankwich) in its discretion gave judgment to the plaintiff for \$100 defendant's actual profits, obviously because the infringement was innocent and accidental. But when an infringement is willful, and actual damages and profits recoverable are less than \$250. we submit that the court properly should award damages of \$250—as in *Widenski v. Shapiro, Bernstein Co.* (*supra*, C.C.A. 1, 1945)—or \$500 for 500 infringing labels at \$1 per label.

We respectfully submit, therefore, that the above cases relied on by appellant in support of its position are clearly distinguishable on their facts with the exception of the *Davilla* case, which is contrary to the decision of this Court in *Douglas v. Cunningham*.

IV. REQUEST FOR ADDITIONAL ATTORNEY'S FEES TO RECOVER THE EXPENSE ON THIS PETITION.

The attorney's fee of \$2000 ordered by the district judge as compensation to the plaintiff for the expense incurred in bringing this action included only the work that had been done in the case in the District Court. The defendant appealed, requiring considerably more legal service to be performed on behalf of the plaintiff. The Court of Appeals awarded an additional attorney's fee of \$500. Now the defendant has taken the case to this Court. We submit that it is unjust for the petitioner to cause such additional legal expense when the plaintiff's cause of action is admittedly just and the defendant has no defense whatever. Section 40 of the Copyright Act empowers the Court of Appeals to award an additional reasonable attorney's fee to compensate the respondent for the expense of this petition. See *General Drafting Co. Inc. v. Andrews*, 37 F. (2d) 54, at 57 (C.C.A. 2, 1930), and *Hartfield v. Peterson*, 91 F. (2d) 998, at 1001 (C.C.A. 2, 1937).

Respondent hereby respectfully petitions this Court for an award of such additional sum as a reasonable attorney's fee as will compensate the respondent for the legal expenses incurred by it in this Court.

V. CONCLUSION.

The present Copyright Law, and particularly Section 101(b), is the fruit of more than one hundred years' experience in endeavoring to protect the author, composer, artist and sculptor, and his property in his creations. The provisions of Section 101(b) represent the accumulated wisdom of years in providing an effective remedy for the owner

of literary and artistic property against the depredations of the commercial pirate. In the forty-three years the present Copyright Law has been in existence it has worked remarkably well, and the keystone of the structure has been Section 101(b). In Section 101(b) Congress has given the District Court complete discretion to award, in lieu of actual damages and profits, such damages as to the Court shall appear to be just, within the limits of \$250 and \$5000. It is of the utmost importance to the effective administration of the Copyright Law that this discretionary power to award statutory damages be preserved. Otherwise the Copyright Law will collapse for lack of an effective remedy, and will be reduced to its state of impotence prior to 1909, when unscrupulous persons could infringe with impunity.

Petitioner asks the Court to destroy the effectiveness of the Copyright Act by adopting the construction of Sec. 101(b) for which it contends. We have pointed out above that such construction is contrary to the express language of the statute itself, the decisions of this Court, the history of Copyright legislation in England and the United States relating to remedies for enforcement, and the legislative history of Sec. 101(b). Copyrights have always been liberally and favorably construed in this and other courts to protect the author, composer, artist and sculptor. The reasons are obvious. It is wholly unnecessary and inexcusable to infringe a copyright. It is of course elementary that a copyright is not a monopoly—any more than a man's house, his horse, his automobile. Others are free to build houses, acquire horses or automobiles of their own. But they cannot steal property which someone else has created. LePere Pottery here could make its own Cocker Spaniel in Show Position, but it could not steal respondent's copyrighted work, as it has done. A copyright is intellectual property and it is protected like any other kind of personal

property—not because it is a monopoly but because it is the product of a man's mind and labor. As Drone in his well-known treatise on *The Law of Property in Intellectual Productions* (Little Brown & Co., Boston 1879 states: (p. 4)

“The principle is as old as property itself, that what a man creates by his own labor, out of his own materials, is his to enjoy to the exclusion of all others.”

The power of the District Court to award the statutory damages of \$5000 in the case of an infringement and sale of infringing copies of the nature and number here shown, under Section 101(b) of the Copyright Act, is unquestionable. The evidence clearly justified the damages awarded and on the facts and as a matter of law we submit there can be no abuse of the District Court's discretion in awarding them. The District Court, sitting as a Court of Equity, and as trier of the facts, in the exercise of its sound discretion awarded the statutory damages it believed just. The action of the District Court was clearly within the law. The Court of Appeals has affirmed the judgment of the District Court. We respectfully submit the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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